



International Law in Namibia

Dunia P. Zongwe

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Langa Research & Publishing CIG
Mankon, Bamenda

Publisher

Langaa RPCIG

Langaa Research & Publishing Common Initiative Group

P.O. Box 902 Mankon

Bamenda

North West Region

Cameroon

Langaagrp@gmail.com

www.langaa-rpcig.net

Distributed in and outside N. America by African Books Collective

orders@africanbookscollective.com

www.africanbookscollective.com

ISBN-10: 9956-550-44-2

ISBN-13: 978-9956-550-44-9

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Zongwe studied at the University of Namibia, Université de Montréal and Cornell University, where he earned both his master's and doctoral degrees in law.

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Acknowledgements

I warmly thank Narnia Bohler-Muller, Horace G. Campbell, Jill Kinahan, Kholofelo Kugler, Foiibe Namene, Ndjodi Ndeunyema, Klaus Striewe, and two anonymous reviewers for their constructive comments and suggestions on earlier drafts of this book. In particular, I take my hat off to Roselyne at Langaa for her professionalism and efficiency.

I am grateful to Cassandra Kisting, Ndamononghenda (‘Ndamona’) Hiveluah, Pepua Karamata, and Leezola R. Zongwe for their invaluable research assistance. In particular, I thank Leezola for her patience and her single-minded dedication in coordinating the output of all the research assistants. She also helped me make the footnotes uniform.

I would also like to extend my thanks to the entire class of 2017 and the Summer-School class of 2018 at the University of Namibia for actively participating in the Public International Law module. Special thanks to Michael Hamukwaya and Emma Teofilus for their unique observations with regard to territory and the African Union, respectively. The same goes to Arnesto Da Costa and Lucia Amupadhi for asking inquisitive questions and raising issues in 2018 during the Summer School about the effect of Article 144 of the Namibian Constitution.

I am grateful to Kudakwashe Mkhario for designing the front cover illustration for this book.

I remain solely liable for surviving errors and shortcomings, if any, in this book.

This book reflects the law and events as they stood at the close of March 2019.

International law in Namibia

There is no textbook on international law in Namibia. For many a year since Independence in 1990 and the establishment of the Faculty of Law at the University of Namibia in 1994, the essential general reference on international law has been John Dugard's *International Law: A South African Perspective*.¹ While that book is of very high calibre, it mainly focuses on South Africa, Namibia being relevant only insofar as it relates to South Africa and its history.

This situation should really worry law teachers in Namibia because, 29 years after Independence on 21 March 1990, Namibian law has evolved a great deal to such an extent that many laws in Namibia grew apart from their South African heritage. As Chief Justice Peter Shivute said in 2013 in *Attorney-General of Namibia v Minister of Justice*:²

...while South African and other jurisdictions' precedent may be persuasive authority for our Courts under given circumstances, it is worth observing that after our country's Independence, Namibian Courts have developed a reservoir of distinctly Namibian jurisprudence based on the Constitution and Namibian law. Decisions of foreign courts that are found to be persuasive due to the similarity of applicable principles, provisions, issues and other circumstances relevant to matters at hand may, of course, be followed by our courts on principle rather than precedent.

It is precisely this "reservoir of distinctly Namibian jurisprudence based on the Namibian Constitution and Namibian law" that this book aims to open up, as far as it concerns international law.

It is high time for lecturers and students in Namibia to teach and learn with a textbook that analyses international law in the specific context of Namibia and that views the nation's legal interactions with

¹ J. Dugard, *International Law: A South African Perspective*, 4th ed, Juta, 2011. This book was first published in 1994, four years after Namibia's Independence.

² *Attorney-General of Namibia v Minister of Justice and Others* (P.12/2009) [2013] NASC 3 (04 April 2013) [8].

other states through its own prism! That emphasis on the Namibian context also entails inquiring into the role that international law played in the making of Namibia and, inversely, the contribution that the country and its laws have made to international law.

A symbiotic yet neglected relationship

This textbook asks a big question: To what extent has Namibia internalized and influenced international law, and, inversely, to what extent has international law impacted the development of Namibia and its laws? This question concerns the symbiotic – and at times ambiguous – relationship between Namibian law and international law.

International law is, however, neglected by the legal profession in Namibia. I observed that many students do not regard international law as a “lively” subject³ or as crucial for their education, many practitioners do not readily see how the rules and principles of international law can help or hinder their cases, and judges under-utilise international law. With reference to adjudication, despite the clear benefits of applying international law, courts have expressly and directly applied international law in about 15 reported cases only.⁴

Nevertheless, this neglect does not imply that Namibian courts disrespect international law. In *Likany*, a case related to the failed Caprivi secession attempt, the Supreme Court of Namibia overruled the *res judicata* principle (i.e., the finality of judgments) and reversed its own earlier decision in *Mushwena*⁵ in order to redress what it perceived as a grave injustice and a clear breach of international law.⁶

³ One afternoon in March 2017, during the Faculty’s twice-a-year forum that engages students and lecturers in a (supposedly) constructive dialogue, one student complained that my international law class was “not lively”, but another student countered that, unlike a subject like delict (i.e., torts), international law contains a great deal of theory and may thus seem less lively than delict.

⁴ See Chapter 6, which deals with the challenges of Namibian judges in applying international law in domestic cases.

⁵ *S v Mushwena and Others* 2004 NR 276 (SC).

⁶ *S v Likany* 2017 (3) NR 771 (SC) 793C-D.

Is this book for you?

This is a textbook for law students in Namibia. When I imagine the audience for this book, I see law students, future legal practitioners, sitting in the front rows. In the back of the class, I see legal practitioners and judges, but most of the audience consists of law students.

I developed the materials in this book as I taught international law to third-year students in the Faculty of Law at the University of Namibia from 2016 to 2018. The materials in this book grew out of the lecture notes I prepared for those classes, and I tested them in front of flesh-and-blood students with genuine questions about the subject. The direct and personal prose style adopted throughout this book reflects the way I actually engaged my students in class.

Nonetheless, if anyone else interested in Namibia and curious to know what part international law played and still plays in Namibia's development as an independent and prosperous nation, please note that I did not mean it but I certainly do not mind it. On the contrary...

INTRODUCTION

Standing behind the rostrum and in front of the green marble of the podium, President Hage Geingob declared Namibia a “child of international solidarity”.¹ He coined that phrase in 2015 during the 70th session of the General Assembly at the headquarters of the United Nations (UN) in New York City. In using that expression, he sought to emphasize the role that the international community played in the making of Namibia.

President Geingob’s ringing declaration is, however, not as factual as you may think. Actually, available evidence does not fully bear it out. For one thing, as I show at different junctures in this textbook, the role of international law in Namibia’s history has been ambiguous. Especially at the early stages of the UN’s evolution from the mid-1940s to the 1960s, the Security Council and – to a lesser extent – the General Assembly sometimes leaned towards South Africa’s position on the Namibia question.² The danger with the ‘Namibia-as-child-of-international-solidarity’ narrative is that it may downplay the heavy and heroic sacrifices made by Namibians themselves and other Africans for the independence of Namibia. In addition, scholars from the Third World Approaches to International Law (TWAIL) movement have contended that Western states have deployed international law as a weapon to dominate and exploit other nations.³

¹ Republic of Namibia, ‘Statement by His Excellency Hage G. Geingob, President of the Republic of Namibia at the General Debate of the UN General Assembly’

<[http://www.gov.na/documents/10181/22710/STATEMENT+BY+HIS+EXCELLENCY+HAGE+G.+GEINGOB,+PRESIDENT+OF+THE++REPUBLIC+OF+NAMIBIA+AT+THE+GENERAL+DEBATE+OF+THE+UN+GENERAL++ASSEMBLY+\(2015+09+29\)/4f5aeb04-840f-460f-9a7c-fa88a090802e](http://www.gov.na/documents/10181/22710/STATEMENT+BY+HIS+EXCELLENCY+HAGE+G.+GEINGOB,+PRESIDENT+OF+THE++REPUBLIC+OF+NAMIBIA+AT+THE+GENERAL+DEBATE+OF+THE+UN+GENERAL++ASSEMBLY+(2015+09+29)/4f5aeb04-840f-460f-9a7c-fa88a090802e)> accessed 28 November 2018.

² See D.U. Zaire, ‘Namibia and the United Nations Until 1990’ in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia’s Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 42.

³ See, for example, A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004). See also J.T. Gathii, ‘TWAIL:

At the same time, you cannot be too hard on a president – or the Namibian President for that matter – for trying to cozy up to the international community in expressing the special place of his country on the international stage. Surely, Namibia immensely benefited from international solidarity. And a great part of that community's contribution was in the form of rules of international law,⁴ as partly expressed in the 28 resolutions the UN Security Council passed on the situation in Namibia.

Accordingly, this textbook aims to provide a deep understanding of the role of international law in the history and life of Namibia. Conversely, the book also explores the role that Namibia, as small as it is demographically, played in developing international law. Though much of that contribution was made with blood, the tragic episodes of Namibian history – especially those that took place during the War of National Resistance in 1904-1908 and the liberation struggle – should not make any analysis of that history blind to the major contribution that it nonetheless was. Thus, unsurprisingly, this book zooms in on Namibia.

The secondary focus is Southern Africa, and the third and last focal point relates to Africa as a whole. This graduated emphasis makes it possible to reflect on developing countries' share in the growth of international law. This book can therefore be seen as a variation on the theme of Africa's contribution to international law.

1. Namibia and international law in the literature

There is no textbook on international law that approaches the subject by focusing primarily on Namibia. Nevertheless, a couple of books have addressed certain important aspects of international law in the Namibian context. First, Naldi's *Constitutional Rights in Namibia* looks at the salient features of the Namibian Constitution and

A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade Law and Development 26.

⁴ A, Memeti and B, Nuhija, 'The Concept of *Erga Omnes* Obligations in International Law' (2013) 14 New Balkan Politics 34-35 and 42 <http://www.newbalkanpolitics.org.mk/item/the-concept-of-erga-omnes-obligations-in-international-law#.W_6C5ZwzbiU> accessed 28 November 2018.

compares them with international human rights.⁵ Tshosa's *National Law and International Human Rights Law* taps into a similar vein of writing.⁶ For the purposes of this textbook, however, Tshosa's treatise comes short in two key respects: One, it discusses human rights only and does not move into the whole realm of public international law; two, it does not look at human rights in Namibia exclusively as Namibia features in the book alongside Botswana and Zimbabwe as case studies.

Ruppel and Ruppel-Schlichting's *Environmental Law and Policy in Namibia* presents environmental law and policy in Namibia.⁷ The duo has edited a book that, given the nature of environmental law, incorporates many rules and principles of international law as they apply to the natural environment in Namibia. This limited thematic scope also holds true for Akweenda's enlightening monograph on Namibia's territory, *International Law and the Protection of Namibia's Territorial Integrity*.⁸

By contrast, a body of law review articles and book chapters dealt with various aspects of international law as it relates to Namibia.⁹

⁵ G.J. Naldi, *Constitutional Rights in Namibia: A Comparative Analysis With International Human Rights*, (Juta 1995).

⁶ O. Tshosa, *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* (Ashgate 2001).

⁷ O.C. Ruppel and K. Ruppel-Schlichting (eds), *Environmental Law and Policy in Namibia: Towards Making Africa the Tree of Life* (3rd edn, Hanns Seidel Foundation 2016).

⁸ S. Akweenda, *International Law and the Protection of Namibia's Territorial Integrity* (Kluwer Law International 1997).

⁹ For instance, F.-X. Bangamwabo, 'The Justiciability of Socio-Economic Rights in Namibia: Legal Challenges and Opportunities' (2013) 5 *Namibia Law Journal* 85; O. Tshosa, 'The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy' (2010) 2 *Namibia Law Journal* 3; Y. Dausab, 'International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution From a Human Rights Perspective' in A Bösl, N. Horn, and A. du Pisani (eds.), *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (Macmillan Education Namibia 2010); D.P. Zongwe, 'Equality Has No Mother But Sisters: The Preference for Comparative Law Over International Law in the Equality Jurisprudence in Namibia' in M. Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010); Legal Assistance Centre, *Gender and International Human Rights* (Legal Assistance Centre 2005); G. Erasmus, 'The Namibian Constitution and the Application of International Law' in D. Van Wyk, M. Wiechers, and R. Hill (eds), *Namibia Constitutional and International Issues* (VerLoren van Themaat Centre for

These have broached topics such as socio-economic rights, the place of international law in Namibian law, constitutional adjudication, gender rights, succession to treaties, and the relationship between Namibia and the UN.¹⁰ One impression emerges strongly from that literature: ‘Human rights’ dominates the international law scholarship relating to Namibia. Although human rights law represents a major component of international law, it does not constitute the sum of the vast field covered by international law.

2. Significance, utility and Eurocentricity of international law

Three themes run through this book. I express these in the form of questions: First, given that international law admittedly centres on European interests, as reflected by both its origins and politics, how can Namibia or any other African or developing country use it for its own (non-European) interests? As Mutua observed, the regime of international law is a “predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.”¹¹ He went on to say that “[t]he construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination.”¹²

My concern with Eurocentricity should not be taken to mean that you should reject anything that is European in origin or that is Eurocentric. On the contrary, I trust that, for the sake of ruthless pragmatism, scholars, policy makers and nations should learn from anyone and any country that has something to teach them. To be sure, Europe still represents one of the world’s regions that made some of the greatest discoveries in science and produced some of the

Public Law Studies 1991); P.C. Szasz, ‘Succession to Treaties Under the Namibian Constitution’ (1989) 15 South African Yearbook of International Law 65.

¹⁰ For instance, D.U. Zaire, ‘Namibia and the United Nations Until 1990’ in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia’s Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 37; and K. Egge, ‘The United Nations and Namibia Since 1990’ in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia’s Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 293.

¹¹ M. Mutua, ‘What is TWAIL?’ (2000) 94 American Society of International Law Proceedings 31.

¹² *ibid.*

finest legal minds, such as Saint Thomas Aquinas, Jeremy Bentham, Ronald Dworkin, Cass Sunstein, and Richard Posner. Namibian scholars and scientists can therefore acquire from Europeans a wealth of knowledge whenever such knowledge speaks to the Namibian context.

Rather, my concern with Eurocentricity aims at raising the awareness of readers from the global South that much of international law formed with a view to advancing the interests and priorities of (Western) European and North American nations. The implication of such realization is that readers from the global South must identify skewed rules of international law and seek ways to deploy them to their advantage or counter them with alternative norms. One of the objectives of the movement called Third World Approaches to International Law (TWAAIL) is precisely to “construct and present an alternative normative legal edifice for international governance.”¹³

Turning to the two other questions: Why do states apply international law? And why should professionals and stakeholders in Namibia bother at all to learn the rules and principles of international law? Put another way, the significance, the utility and the Eurocentricity of international law are the themes threaded through this book.

3. Is Namibia a child of international law?

3.1 Controversy around this idea

Keeping in mind the themes I have just mentioned, a vital aspect of the point I develop throughout this textbook is that Namibia has benefited from and contributed to international law in a way that shaped the country’s political and socio-economic development and in a way that few other countries experienced. I realize that this point may excite controversy and meet with fierce resistance from certain quarters. Just like President Geingob’s description of Namibia as a ‘child of international solidarity’ will probably not escape scathing criticism.

¹³ *ibid.*

The difficulty remains that many scholars see international law as a product of huge power imbalances and Western domination. For those scholars and intellectuals, the past of a country like Namibia is pregnant with examples of how international law undermined the self-determination and emancipatory goals of non-European peoples in the Third World.¹⁴ For them, maintaining that international law benefits developing countries may amount to ‘betrayal’.¹⁵

However, admitting that international law sometimes positively impacts a nation’s development does not imply underrating or forgetting international law’s dark sides or ugly legacy. And, in the particular context of Namibia, the advantages of resorting to international can be seen (1) from the onset, i.e., the manner in which the country gained its independence and throughout the development of its Constitution; (2) from the laws of the country; and (3) from the manner in which the courts have implemented and used international law when deciding cases with some international dimensions.

Perhaps, the greatest gift of international law to Namibia is the rich content of international law, as it applies to Namibia and as laid out in this book. In that sense, this book constitutes a formal statement of one of the main sources of Namibian law.¹⁶ It gives living proof of Namibia’s past and continuing engagement with international law.

But another difficulty lies in saying whether Namibia took more from international law than international law offered Namibia. And, since virtually all states benefited from the rules of international law, the next difficult question becomes: What makes the Namibian experience unique? The difference resides in the *extent* of international law’s involvement in Namibia’s life and rise. In other words, Namibia’s current development would not be possible

¹⁴ Gathii op cit; O.C. Okafor, ‘Critical Third World Approaches to International Law (IWAII): Theory, Methodology, or Both?’ (2008) 10 International Community Law Review 371.

¹⁵ Mutua op cit 32 (advocating for the rejection of the legacy of what the author calls ‘minimalist assimilationists’; he defines these assimilationists as a “betrayal class” who collaborates with the dominant discourse contained in international law).

¹⁶ The other formal sources of Namibian law are the Constitution, legislation, case law, common law, customary law, and the writings of academic authors.

without the international legal arrangements it has entered into. As Melber put it, “Namibia, more than most other sovereign states, has been the result of an active role taken by the UN as the institutionalised representative of the global community of states”.¹⁷

3.2 Originality of this idea

The general idea that the international community did Namibia a lot of good is not unique. Following Geingob’s declaration that ‘Namibia is a child of international solidarity’, Egge depicted Namibia as a “child of the UN”¹⁸ and Diescho as a “child of pan-Africanism and internationalism”.¹⁹

What makes my principal argument and this book stand out from the rest is the manner in which *I articulate* that general idea. I articulate the observation that the international community intervened decisively in favour of Namibia’s independence and nationhood *from the perspective of international law*. As I highlighted in the literature survey at the beginning of this chapter, earlier publications on the relationship between Namibia and the international community never took that perspective systematically, neither did they elaborate on it with the fine details this book dishes out.

Thus, I do not as much contend that Namibia is a child of *international solidarity*; I rather argue that Namibia is a child of *international law*. More than a nuance distinguishes the two views. And, whether you see it as a refined version of Geingob’s observation or as a sheer novelty, this argument nobody has so far expressed it or spelled it out. Plus, I do not portray Namibia on the international stage merely as a passive beneficiary of solidarity but as an active law developer.

¹⁷ H. Melber, *Understanding Namibia: The Trials of Independence* (Jacana Media 2014) 161.

¹⁸ K. Egge, ‘The United Nations and Namibia Since 1990’ in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia’s Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 293. See also A. Bösl, ‘Namibia’s Foreign Relations in a Changing World – An Appraisal’ in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia’s Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 9.

¹⁹ J. Diescho, ‘Namibia’s Attitude Towards Pan-Africanism’ in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia’s Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 413.

4. Why it matters to learn international law in Namibia

To a question I asked in class on the importance of international law for states, one of my students answered that international law is both the birth certificate and the death certificate of states. By that, he meant that international law regulates the recognition of states, like it did in the Namibian case. Similarly, when a state ceases to exist or disintegrates, as in the case of the former Soviet Union (i.e., the USSR²⁰), international law also provides the rules for such process. My student's answer is an original and telling, though incomplete, way of demonstrating the significance of international law.

Unfortunately, students like the one I have just mentioned do not make up the majority. When you speak to law students and legal professionals, you get the impression that they consider international law one of these subjects that you have to study to simply crown your legal education. Many members of the legal profession do not see international law as a core subject in the legal curriculum. To be sure, international law is not even taught at Namibia's only bar school, the Justice Training Centre (JTC).

4.1 Significance of international law

Few perceptions could stray farther from the truth. First and foremost, the Constitution requires that international law apply in the national legal system as Article 144 makes international law "part of the law of Namibia". The provisions of Article 144 create an obligation to study, understand and apply international law just like lawyers and law students must familiarize themselves with the general principles of law contained in other sources of Namibian law, for instance, statutes, case law, and customary laws.

And, as I show in this book, international law determines the most important and existential issues of contemporary Namibia, especially some of its most pressing economic questions. Namibia's recognition as an independent state presents a superb example.²¹ That recognition is governed by the rules of international law, more

²⁰ This acronym stands for 'Union of Soviet Socialist Republics'.

²¹ The Republic of Namibia attained its independence on 21 March 1990, with help of the international community. Chapter 3 discusses the historical developments leading up to this historical change.

specifically the rules on the recognition of states, which I explain in Chapter 9. A second example highlights the significance of international law, namely the territorial integrity of Namibia. Both the rules of international law pertaining to statehood and territory – territory being one of the criteria for statehood – protect Namibia’s territorial boundaries.²² Another excellent example, this time around in the field of economic relations, is the Southern African Customs Union (SACU), which accounts for Namibia’s biggest source of revenue.²³ International trade law regulates SACU.

A further example is drought, which has had a negative impact on Namibia’s agriculture and economy for the past few years.²⁴ Questions of drought cannot ignore the rules and principles of international environmental law – a branch of international law. International environmental law tackles issues relating to drought, insofar as climate change causes it. Climate change and the rules of international environmental law aimed at reversing climate change entail the realization that global warming and climate change pose challenges that cannot be overcome by individual countries, but by countries acting collectively. Specifically, the government alone cannot win the fight against drought in the country; Namibia will have to engage the international community at the highest level so that, through collective action, Namibia and its international partners can reverse drought and climate change.

Last but not least, international law remains crucial to the reparation claims raised by members of the Ovaherero and Nama communities against Germany for the genocide they suffered in the

²² Article 1 of the Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (1933); J. van der Vyver, ‘Statehood in International Law’ (1991) 5 *Emory International Law Review* 9.

²³ Martin Mwinga and others, *Namibia Fiscal Policy Analysis March 2019: Namibia’s Fiscal Policy at the Cross Road* (First Capital Namibia 2019) 7; E. Brandt, ‘A Revised Outlook Is Not a Downgrade – Schlettwein’ *New Era* (Windhoek, 6 September 2016) <<https://neweralive.na/posts/revised-outlook-downgrade-schlettwein>> accessed 30 November 2018.

²⁴ M. Carter, ‘Drought Conditions Linger On’ *Namibia Economist* (21 December 2016) <<https://economist.com.na/21264/agriculture/drought-conditions-linger-on/>> accessed 30 November 2018. I must mention, however, that 2017 has been an unusual year in the sense that the rainfall has been markedly higher than in previous year, so much so that a few places in Namibia, including areas where a number of schools were located, found themselves under water sometime in the first three months of 2017.

hands of German soldiers during the 1904-1908 War of National Resistance.²⁵

4.2 Practical utility of international law

International law also has benefits for the ways people can approach questions with an international law dimension. Thus, this book enables you to engage in structured and intelligent conversations on many issues that have international dimensions and that affect Namibia. One of the book's goals is to provide readers with such a framework to analyse, evaluate and solve those issues.

International law serves as restraint on the actions of states and governments. Effectively, even when states contravene rules of international law, they never acknowledge that their conduct violates international law. Instead, they try to find some justifications – or, less euphemistically, excuses or pretexts – for their behaviour.²⁶

4.3 Relevance of international law for the legal profession

The significance of international law rests primarily and evidently on Article 144 of the Namibian Constitution, which makes international law a part of Namibian law and a source of law, alongside common law, judicial precedents, legislation, and so on.²⁷

As a source of Namibian law, international law proves definitely useful in judicial proceedings. And, beyond the judicial context, international law serves as practical tool in diplomatic relations, as I show in several parts of the book.²⁸ At both national and international levels, government delegates resort to the rules of international law when they negotiate with representatives of other states and when they call in question the conduct of those states. They also use international law to make policies and laws. Knowledge

²⁵ *Vekuii Rukoro and Others v Federal Republic of Germany* [2019] US District Court, Southern District of New York. See also K. Tjitemisa, 'Kazenambo Welcomes Genocide Lawsuit' *New Era* (Windhoek, 10 January 2017) <<https://www.newera.com.na/2017/01/10/kazenambo-welcomes-genocide-lawsuit/>> accessed 30 November 2018.

²⁶ S. Besson, 'Sovereignty, International Law and Democracy' (2011) 22 *European Journal of International Law* 373.

²⁷ Article 144 of the Constitution of the Republic of Namibia.

²⁸ For example, Chapter 12 (dispute resolution), Chapter 15 (African Union), and Chapter 17 (economic relations).

of international law can bring a bargaining advantage in decision-making processes.²⁹ And, when states lock horns in a dispute with some international dimensions, the rules of international law offer ways of resolving that dispute. Even though states parties to a dispute may not agree on the interpretation of the facts and the applicable norms, they both have international law as a common frame of reference.³⁰

5. The role of politics in international relations

Though this book is mostly about the *legal* rules and principles of international law, it takes account, whenever possible, of international politics. I cannot overemphasize the role of politics in international law.³¹ Conversely, international law forms an essential part of international relations and politics.³²

A good example of the important role that international law performs in international affairs took place during the struggle for independence. Although the UN's independence plan for Namibia already existed in the late 1970s, Namibians had to wait about 10 more years before it could gain independence from South Africa. The reason for this long wait is eminently political: Cold War machinations had caught up with Namibia, which saw, as a result, its independence long delayed. Chester Crocker, the US Assistant Secretary of State for African Affairs, pursued an infamous policy of 'linkage', which consisted in ending South Africa's illegal occupation of Namibia on condition that Cuban troops withdraw from Angola.³³

²⁹ C.F. Diaz, 'With Law in Their Minds: Some Reflection on the Nature of Public International Law at the Light of Current Political Science Theory,' (1998) 4 *ILSA Journal of International and Comparative Law* 1149.

³⁰ P. Sharp, 'For Diplomacy: Representation and the Study of International Relations' (1999) 1 *International Studies Review* 33; M. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 7.

³¹ M. Cerar, 'The Relationship between Law and Politics' (2009) 15 *Annual Survey of International Comparative Law* 19.

³² Bösl op cit 4 (stating that there is a consensus in academia that the terms 'foreign affairs' and 'international relations' have in common the fact that they define the role of the actors, interests, and strategies and transboundary activities on the basis of international law).

³³ Z. Kagan-Guthrie, 'Chester Crocker and the South African Border War, 1981-1989: A Reappraisal of Linkage' (2009) 35 *Journal of Southern African Studies* 65.

The US linkage policy had the effect of blocking Namibia's independence for almost a decade.³⁴ No wonder Namibia's independence from South Africa occurred one year after the Cold War ended.

If states applied international law consistently, politics would not be problematic and, thereby, relevant to the study of international law. Unfortunately, states do not always international law, for politics prevail in international relations; and it undermines the predictability of rules and state practice.

In terms of methodology, international law's intimate link with international relations implies that I incorporate in this book illuminating insights from international relations as an academic discipline. This book's methodology, therefore, features notions of power, institutions, identity or ideas, and history.³⁵ Dugard's *International Law* follows the traditional approach – an approach that mostly assumes that states apply international law because they have expressly consented to it. This book is not a 'Namibianization' of Dugard's *International Law* and approach; it largely departs from the doctrinalism and formalism that define much of the traditional international-law scholarship. This departure usually manifests in the numerous instances when I offer my personal opinion on a given aspect of international law.

In particular, lawyers use this doctrinal approach, and that black-letter method characterizes pure legal research. But that approach is divorced, far removed from what actually happens in practice. The doctrinalism of traditional approaches to international law fails in two further respects: first, users other than lawyers also rely on international law; second, doctrinalist approaches poorly explain and predict the conduct of international relations, the behaviour of states, and their (non-)compliance with international law. Unsurprisingly, contemporary international-law scholarship showcases work by

³⁴ T.-B. Gurirab, 'The Genesis of the Namibian Constitution: The International and Regional Setting' in A Bösl, N. Horn, and A. du Pisani (eds.), *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (Macmillan Education Namibia 2010) 111-112.

³⁵ For a good explanation of the major approaches to international relations, see H.R. Nau, *Perspectives on International Relations: Power, Institutions, Ideas* (3rd edn, CQ Press 2012).

jurists who deliberately use insights, perspectives and theories borrowed from international relations and political science.³⁶

By those observations, I do not mean to say that this book does not involve black-letter methodologies. The book surely involves black-letter law. Otherwise, this book would not qualify as a *legal* publication. What I more precisely mean is that, unlike Dugard's celebrated *International Law* and other traditional treatises on international law, black-letter law fills limited space in the book, which reserves the remaining space to considerations of politics.

6. How this book is organised

This is a textbook mainly intended for law students. To explain the importance of international law in Namibia, I have divided the book into 19 chapters. Those chapters fall in three broad categories. Note that these categories are to a large extent arbitrary. They only aim to help you understand the materials I included in this book.

The first category deals with background questions, such as the nature of international law (Chapter 2), and the history of international law (Chapter 3). The second part addresses essential or core questions of international law, especially sources of international law (Chapter 4), treaties (Chapter 7), states and statehood (Chapter 8), recognition of states and governments (Chapter 9), territory (Chapter 10), state responsibility (Chapter 11), dispute resolution (Chapter 12), immunity from jurisdiction (Chapter 13), and the use of force (Chapter 14). The third and final category deals with specific themes, namely the African Union (Chapter 15), human rights (Chapter 16), international economic relations and SACU (Chapter 17), and the law of the sea (Chapter 18).

In the final chapter, Chapter 19, I pull together all the strands or elements supporting my overall observation from all the preceding chapters of the book and then expressly formulate it. I synthesise all the chapters and state definitively the book's central theme.

³⁶ For instance, A. Sinclair, *International Relations Theory and International Law: A Critical Approach*, New York, Cambridge University Press, 2010; A.T. Guzman, *How International Law Works: A Rational Choice Theory*, New York, Oxford University Press, 2008; and J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, New York, Oxford University Press, 2005.

You must master four salient parts of the book in order to grasp the working of international law in general and its application in Namibia in particular. These parts are sources of international law (Chapter 4), the place of international law in the Namibian legal system (Chapter 5 and Chapter 6), state responsibility (Chapter 11), and international adjudication (Chapter 12). These four parts form the essential components of the analytical and evaluative framework that this book offers. In the closing paragraphs, I sketch out that framework.

WHAT INTERNATIONAL LAW IS

Before I start my demonstration that Namibia and international law enjoy this unique symbiotic relationship, it is important to pause and reflect on what is actually meant by international law. The question as to what is international law is a vexed and multi-faceted one. I propose to answer the problematic of what international law truly is by approaching it from five angles, namely

- (1) the *definition* of international law and its relationship with other branches of law and other connected disciplines such as politics,
- (2) the character of international law as a *legal system*,
- (3) the question of *sanctions*,
- (4) the question of *compliance* with international law, and
- (5) the *Eurocentricity* of international law.

While a host of scholars from Africa have attempted to rethink the nature of international law, their efforts have been minimal. However, their scientific contribution to the debates on international law's Eurocentricity and its usefulness as an interpretive tool are two notable exceptions. In Namibia, particularly, cases such as *Corporal Punishment by Organs of State*³⁷ and *Kauesa*³⁸ perfectly illustrate the judges' understanding of international law as a legal-reasoning tool to make sense of domestic statutes.

1. Introduction

Like law in general, the nature of international law is without a doubt problematic. The first question or problem relates to the very

³⁷ *Ex Parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC). Hereinafter 'The Corporal Punishment case'.

³⁸ *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC). Hereinafter 'Kauesa'.

definition of international law. What are the contents and contours of international law? How do the rules and various branches of international law stick together?

Related to its nature and character is the question of the Eurocentricity that international law is (still) imbued with. Scholars and intellectuals from the Third World has challenged official international law on this ground. They see international law as an imperial project and they seek to offer alternative normative bases for international law.³⁹

Furthermore, international law does not have effective legislative,⁴⁰ executive, and judicial organs, unlike municipal law. ('Municipal law' is the phrase used to identify the rules of the internal laws of individual countries. It refers to law within a specific country as opposed to other countries) For that reason, jurists such as John Austin have argued that international law is not really law and that only the rules of municipal laws qualify as 'law'.⁴¹ Those jurists, especially those subscribing to the analytical school of positivism, contend that international law does not qualify as 'law' because it lacks effective sanctions.⁴²

This view is simplistic because it overlooks the fact that states and governments have for decades been applying norms enacted at the international level by the international community.⁴³ It ignores the myriad practical reasons for complying with international law. It also ignores the consent of states to being bound by those norms.⁴⁴ That consent is explicit in the case of treaties and implicit in the case of international customary law.⁴⁵

³⁹ See M. Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31.

⁴⁰ R. M.M. Wallace, *International Law* (5th edn, Sweet & Maxwell 2005) 3.

⁴¹ S. Sucharitkul, 'International Law as Law' (2010) 15 Annual Survey of International and Comparative Law 2.

⁴² *ibid.*

⁴³ Wallace *op cit* 2-3.

⁴⁴ *ibid.*

⁴⁵ See M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen Publishers 2003) 5.

2. Definition

The definition of international law can be broken down into four components, namely the scope, unity or coherence, demarcation, and national integration. I tackle each component in turn in this section.

2.1 Scope of international law

The traditional or old definition of international law is that international law is the body of rules and principles that regulate the conduct of states among themselves.⁴⁶ This definition reflects the early focus on states in international law. This is the classical inter-state model.

This model is clearly outdated. There is a host of new actors and a growing diversity of new subjects in international law. These new subjects of international law include the numerous international organisations that exist today, for example, the World Trade Organization (WTO), the International Labour Organisation (ILO), the Southern African Development Community (SADC), and the Organization of Petroleum Exporting Countries (OPEC). Since 1949, international organizations have become subjects of international law. That year, the International Court of Justice in the *Reparation* case held that members of the international community created the United Nations as an entity possessing “objective international personality”, together with the capacity to bring international claims against states, and not merely personality recognised by those members alone.⁴⁷

In addition, there has been a marked extension of legal personality to natural persons in many treaties since the end of World War II.⁴⁸ The development of international criminal justice⁴⁹ indicates that individuals have become subjects of international law, too. Thus, Joseph Kony of the Lord Resistance Army in Uganda and former President of Côte d’Ivoire, Laurent Ngagbo, can incur

⁴⁶ J.L. Brierly, *The Law of Nations* (6th ed, Clarendon Press 1963).

⁴⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949 (I.C.J. Reports 1949) 174.

⁴⁸ Schabas W. A, *An Introduction to the International Criminal Court* (4th ed, Cambridge University Press 2011) ix.

⁴⁹ M. C Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinus Nijhoff Publishers 1987) 23.

individual accountability for mass atrocities and they can be taken to the International Criminal Court. This is a novel aspect of contemporary international law.⁵⁰

Other new subjects of international law include multinational corporations and non-governmental organizations (NGOs), for example, Oxfam and the SOS Children's Villages. Another example: The 1966 Convention on the Settlement of Disputes Between States and Nationals of Other States (ICSID Convention) gives the International Centre for the Settlement of Investment Disputes jurisdiction over 'nationals of another contracting state', which include multinational corporations.⁵¹ The same provisions of the ICSID Convention imply that those corporations enjoy standing before the Centre.

As a result of these developments, the definition and understanding of international law has changed. Today, international law can be defined as the law that governs "the conduct of states and of international organizations and [...] their relations *inter se*, as well as [...] some of their relations with persons, whether natural or juridical".⁵²

Notwithstanding the rise of new actors, states and intergovernmental organizations remain primary subjects of international law.⁵³ It follows that a more appropriate definition of international law would be:

International law is the body of rules and principles that regulate the behaviour of states in their relationships between one another, as well as some of their relationships with persons, natural or juristic, such as international organizations and non-governmental organizations.

⁵⁰ N. Okuwaki, 'The Changing Nature of International Obligations: Effectiveness of International Law and Compliance' (1996) 90 American Society of International Law: Proceedings 352.

⁵¹ Article 25(2) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. 159; (1965) 4 I.L.M. 532.

⁵² As defined by the American Law Institute (1987) Restatement of the Foreign Relations Law of the United States (Third) 101.

⁵³ Wallace op cit 1.

2.2 Problems of unity

What is international law and what sets it apart from other branches of law? This question concerns the unity or coherence of international law. The norms of international law have been increasing in number and diversity such that questions have been raised regarding its unity or coherence. The argument is that, for international law to qualify as an ordered system, it must have some level of unifying and coordinating principles.⁵⁴

A legal system or legal order can be defined in a variety of ways. One practical way of defining a legal order is by looking at its normativity. Here, the emphasis is on autonomy and self-coherence as attributes of a legal system.⁵⁵

What is problematic is that the international legal process is particularly complex. The complexity of coordinating states' actions is so complicated that it verges on 'anarchy' and defies the very idea of a legal system.⁵⁶ This apparent anarchy results from state sovereignty.⁵⁷ The international system comprises more than 190 countries that are all regarded and treated as equal under international law.

What is more, international law displays little procedural hierarchy in the sense that "one or another court, one or another agency, one or another diplomatic settlement" prevails over another.⁵⁸ This is odd because, except for earliest primitive societies, authority and legal structures in societies are hierarchical. By contrast, authority and legal structures under international law are vertical. Unlike municipal law, authority and enforcement of laws lie much less in some international bodies or organizations than in the states themselves.⁵⁹ The 'arbiters of the world order' are ultimately states, which adopt, interpret and enforce rules of international law.⁶⁰

⁵⁴ E.T. Jouannet, *A Short Introduction to International Law* (1st edn, Cambridge University Press 2014) 52.

⁵⁵ *ibid* 30.

⁵⁶ Janis *op cit* 7.

⁵⁷ G. Simpson, 'The Nature of International Law' in H. J. Morgenthau (ed), *Positivism, Functionalism and International Law* (Ashgate Publishing House 2001) 487.

⁵⁸ *ibid*.

⁵⁹ *ibid*.

⁶⁰ M.N.Shaw, *International Law* (7th edn, Cambridge University Press) 12.

2.3 The boundaries of public international law

It is easy to confuse public international law with private international law. A number of characteristics set public international law apart from private international law, although that distinction is increasingly fading. Private international law refers to cases *within* legal systems, where elements of foreign law intervene, prompting questions about the application of foreign law or the role of foreign courts.⁶¹ It refers to private transactions by foreign corporations and individuals. On the other hand, public international law, or simply ‘international law’, relates to relationships between states in a wide range of fields.

Likewise, public international law (hereinafter ‘international law’) should be distinguished from related disciplines or fields of inquiry, such as international comity or state practices that result from courtesy among states. International law is generally seen as legally binding whereas international comity is not. However, the two sometimes coincide. And the fact that international law is distinct from international comity, ethics, morality or politics, does not imply that such considerations are not important. Actually, politics – to use but one example – is preponderant in international law.

International law cannot be totally divorced from politics. Politics – and the display of power – is more evident in international law than it is in municipal law. At the same time, linking international law and politics has become an accepted mainstream activity in both disciplines.⁶² In fact, the distinction between international law and politics is not clear-cut. As a case in point, although the criteria for statehood are fairly straightforward, the formal recognition of political entity as a state is based on political considerations such that recognition may be denied a state that meets all the criteria for statehood. Thus, even if Somaliland⁶³ can most probably demonstrate that it meets all the criteria for statehood and that it already functions as an effective state, this demonstration may not be

⁶¹ *ibid* 1-2.

⁶² S.V. Scott, ‘Identifying the Source and Nature of a State’s Political Obligation Towards International Law’ (2004) 1 *Journal of International Law and International Relations* 60.

⁶³ C. Clapham, ‘Long Walk to Statehood: Why Somaliland Deserves International Recognition’ (2015) *Georgetown Journal of International Affairs* 1.

enough for the African Union to recognize it as a state independent from Somalia.

2.4 Problems of relationship with municipal law

The way international law relates to national legal systems have been the subject of some debate. The distinction between international law and municipal law has been overlapped. International law is the 'law of internal society' as it governs even relationships in national legal systems that have no international or foreign element.⁶⁴ First, many rules regarded as internal have international origins.⁶⁵ The Bill of Rights in Chapter 3 of the Namibia Constitution drew from the 1948 Universal Declaration of Human Rights⁶⁶ and the international bill of rights in general. Second, there are emerging transnational legal regimes, such as the laws that regulate sports, trade, and the Internet.⁶⁷

Notwithstanding the growing intersection between international law and national law, municipal law does differ in some remarkable ways from international law. Although the rules of international law remain the same for all states, the manner in which those rules are applied in national legal systems are different, as I show in Chapter 5 and Chapter 6. International law is treated as a distinct legal system by states. In national law, however, international law is not always treated as such.⁶⁸ In some states, international law merely enjoys persuasive authority, while in states like Namibia it is one of the binding sources of domestic law.

Furthermore, the rights and obligations a state enjoys and incurs are, on the international plane, supreme in the sense that they prevail over other rights and obligations of states under their internal law. By contrast, national law often prevails over international law on the national plane.

⁶⁴ *ibid* 27.

⁶⁵ E.T.Jouannet *op cit* 31.

⁶⁶ See the Preamble of the Constitution of the Republic of Namibia, 1990.

⁶⁷ Jouannet *op cit* 31-32.

⁶⁸ T. Buergeenthal and S.D. Murphy, *Public International Law in a Nutshell* (5th edn, West Publishing Co 2013) 4.

3. International law as a legal system

Comparisons between international law and municipal law form one major justification for the criticisms by some scholars who maintain that international law does not fit the definition of a ‘law’, a ‘legal system’ or a legal order. They also base their arguments on John Austin’s thesis of law as the command of a superior.⁶⁹

These arguments raised the question as to the basic requirements for a legal system. The French author Montesquieu is credited with the intellectual development of the separation-of-powers doctrine. He held that state power should be separated into three branches, namely the executive, the legislative, and the judicial. The idea behind the doctrine was to avoid the concentration of powers within the hands of one and the same person, thus preventing autocratic rule. This categorization of state power in three branches has also become a convenient way of conceiving the basic requirements of properly functioning legal systems.

The three branches of power, as conceived by Montesquieu, are particularly useful when comparing international law with municipal law. In that respect, international law is best described as a “relatively rudimentary form of human self-socialising” that fails to produce “simulacra of systems of national law and national administration”.⁷⁰

3.1 International parliament

There is no international parliament in international law. It is outside any standing institutional legislative structures that states lay down the rules of international law, whether soft or binding. From a doctrinal perspective, most of international law is binding by virtue of the consent of states. Customary international law and treaties are the archetypal examples of international law whose binding nature can be traced back to the consent of states. However, this traditional

⁶⁹ A. Orakhelashvili, ‘The relevance of theory and history – the essence and origins of international law’ in A. Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 8.

⁷⁰ P. Allott, *The Invasion of Iraq and the Nature of International Law* (Inter Alia 2006) 91-93.

doctrine of compliance with international law frequently comes under attack as inaccurate⁷¹ – a point that I explain in Chapter 5.

The General Assembly of the United Nations has at times been compared to an ‘international parliament’.⁷² Yet the General Assembly has only the power to adopt non-binding recommendations. Even the treaties adopted by the General Assembly are only binding on individual member states if and only if they ratify those international instruments, which is not always the case.

3.2 International courts

Although no international government, no international parliament exists under international law, international courts exist. The International Court of Justice (ICJ) is arguably the best known court, and the most relevant to public international law.⁷³

The ICJ, formerly known as the Permanent Court of International Justice (PCIJ) between 1920 and 1945, hears and decides disputes involving the interpretation and application of international law.⁷⁴ Unlike courts in national jurisdictions, the ICJ hears and decides very few cases. Unlike national courts, the ICJ’s jurisdiction depends on consent from states. Thus, unlike national courts, the ICJ lacks compulsory jurisdiction. This is a fundamental distinction between most international courts, including the ICJ, and national courts.

Another notable difference, flowing from the consent requirement of jurisdiction, is that matters sent to the ICJ by consent are usually issues of secondary importance. As a result of the consent-based nature of the jurisdiction of international courts, many disputes involving important issues of international law that could be heard in

⁷¹ N. Okuwaki op cit 349-352.

⁷² See, for instance, L. Dolivet, ‘The General Assembly’ (1946) *Free World* 12, 16 (drawing parallels between the General Assembly of the United Nations and an international parliament, but concluding that the General Assembly falls short of a “parliament of the world”).

⁷³ See also the Charter of the United Nations and the Statute of the International Court of Justice.

⁷⁴ S. Rosenne, *Intervention in the International Court of Justice* (Martinus Nijhoff Publishers).

international forums cannot be heard because one of the parties to the dispute objects to that forum's jurisdiction.

In addition to its power to determine contentious matters, the ICJ is empowered to issue non-binding advisory opinions.

It is important to note that international courts are not the only means of resolving disputes involving international law. There are non-judicial means for settling disputes, such as negotiation, arbitration, diplomatic conferences or good offices. In addition, there are several international organisations that are involved in dispute resolution, irrespective of whether these organizations are quasi-judicial, political, diplomatic, or purely administrative in nature. These various methods and organisations formulate solutions to disputes and societal problems using international law.

Similarly, as Janis even observes, most disputes involving international law are resolved by national courts rather than international fora and that states or national courts do not defer matters involving international law to foreign or international jurisdictions.⁷⁵

3.3 World government

There is no central executive authority with agents tasked with enforcement of international law. The United Nations (UN), its Security Council specifically, is sometimes said to be the central executive authority, but it does not squarely fit the idea of a central executive authority, as understood in domestic law.⁷⁶ The UN does not have the power to compel states to comply with the law and it lacks a *permanent* enforcement agency to punish those who violate international law.⁷⁷ Nor are the members of the Security Council democratically elected by the international community of states. The Security Council thus enjoys a different sort of legitimacy than the one enjoyed by a democratically elected domestic government.

The United Nations has the power to authorise to use of force and send peacekeepers, as it did in the situation in the Democratic Republic of the Congo (DRC). Before the UN came into existence

⁷⁵ Janis op cit 7.

⁷⁶ See J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 3.

⁷⁷ J. Dugard op cit 3. (Emphasis added)

in 1945, states used to resort to self-help.⁷⁸ Still, notwithstanding the creation of the United Nations, international law still has no institution that comes close to a government or a central executive authority in municipal law.

4. Sanctions as command of the superior

John Austin and other legal positivists claim that law, properly so called, is an emanation of the command of a ‘political superior’ on a ‘political inferior’ or subordinate.⁷⁹ Failure by the political inferior to obey his superior’s command would result in a sanction being meted out to the inferior.⁸⁰ Austin criticized international law as lacking that element of command or sanction that he sees as indispensable to the existence of law as an empirical fact.⁸¹ He could not identify among the states a political superior who gives commands or “the sanction of physical force” to other states.⁸²

The fact that there exists no central authority in the strict sense does not mean international law has no authority. Chapter 7 of the UN Charter allows the Security Council to authorize the use of force by states individually and/or collectively. Moreover, the UN, as I mentioned in the previous section, has the power to establish peacekeeping missions in various countries. It is a power the United Nations has been using since the end of the Cold War.⁸³

International law also has the authority to start prosecution and punishment of individuals for international crimes.⁸⁴ Specifically, when a person commits any of the international crimes prohibited by

⁷⁸ *ibid.*

⁷⁹ S. Sucharitkul, ‘International Law as Law’ (2010) 15 *Annual Survey of International and Comparative Law* 2; E. Elliott, ‘Future of International Law’ (1917-1918) 6 *California Law Review* 268.

⁸⁰ *ibid.* 2.

⁸¹ The command theory was developed in J. Austin, *The Province of Jurisprudence Determined* (John Murray 1832).

⁸² E. Elliott *op cit.*

⁸³ See Chapter 14.

⁸⁴ S. A. Fernandez de Gurmendi ‘International Criminal Law Procedures, the Process of Negotiations’ in R.S. Lee (ed), *The International Criminal Court: Issues, Negotiations, Results* (Kluwer Law International 1999) 175 – 188.

the Rome Statute establishing the International Criminal Court,⁸⁵ he can be indicted, tried and convicted by that Court. This is how former Ivorian President Laurent Gbagbo and Kenyan President Uhuru Kenyatta found themselves in front of that international court. It should be noted, however, that this enforcement action only applies to individuals, not states.

Economic sanctions and exclusion from membership in international organisations are another example of enforcement action in international law. The Security Council of the United Nations can only take binding action when a given situation breaches or threatens international peace and security. These actions are limited to sanctions. Zimbabwe was excluded from the Commonwealth following widespread human rights abuses⁸⁶ and the controversial land reform programme of the government.⁸⁷ Non-recognition of territorial expansion can also be seen as an additional means to enforce international law. Here, the annexation of Crimea by Russia comes to mind.⁸⁸ The international community did not recognise such territorial expansion, which could be seen as a way of enforcing international law.

5. Why do states apply international law?

5.1 Austin's sanctions theory does not explain state compliance

If international law were not really 'law' or did not entail the threat of sanctions, how come states continue to apply it and use in its official statements? This is a fundamental issue in international law

⁸⁵ Article 5 of the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, 2002.

⁸⁶ Internal Displacement Monitoring Centre, *Zimbabwe: The Many Faces of Displacement: IDPs in Zimbabwe* (Internal Displacement Monitoring Centre 2008) 8.

⁸⁷ M Ndulo, 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order', *Framing the State in Times of Transition* (undated) 178.

⁸⁸ G. Bovt, 'What Nobel Laureate Svetlana Alexievich Means to the "Russian World"' (2015) Huffpost <https://www.huffingtonpost.com/georgy-bovt/nobel-laureate-svetlana-alexievich-russian-world_b_8280746.html> accessed 23 March 2019.

accessed on 09/02/2017, 2017, 1.

and a lot of ink has been spilled in an attempt to provide satisfactory answers to this issue.⁸⁹

States obey international law for reasons other than the threat of sanctions. There are several reasons for the continued acceptance of international law by states and for the ever-increasing role it plays in international relations. First, it is important for states to follow the same rules.⁹⁰ Second, it is practical for states to limit their sovereignty in return for reciprocal limitations on the part of other states.⁹¹ Maintaining relationships of various kinds pivots on reciprocity. The traditional doctrine of international law assumes that effective compliance with international law is secured by the reciprocal nature of international obligations.⁹²

Third, states really need international rules when they seek to attain common goals, like the protection of the environment and the prevention of global warming.⁹³ Fourth, international law carries a number of advantages. Notably, observing international law creates a good image and reputation in the public opinion. Most states also use international law for that reason.⁹⁴

Another reason states often abide by international law is that international business transactions are increasingly being formulated in distinctively legal language, not in terms of morality, ethics or international comity.⁹⁵ Koh adds another reason, saying that nations obey international law because they actively interpret and debate international law questions domestically.⁹⁶

⁸⁹ For example, R. Mushkat, 'State Reputation and Compliance With International Law: Looking Through a Chinese Lens' (2011) 10 Chinese Journal of International Law 703; A. D'Amato, 'The Coerciveness of International Law' (2009) 52 German Yearbook of International Law 437 (arguing that there is no distinction between international law and municipal law as far as the application of law is concerned); and H.H. Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599.

⁹⁰ Shaw op cit 8.

⁹¹ A.T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) (arguing that reciprocity, reputation, and retaliation are the key to understanding why states obey international law); Shaw op cit 7.

⁹² Okuwaki op cit 350.

⁹³ Janis op cit 8.

⁹⁴ Shaw op cit 8.

⁹⁵ *ibid.*

⁹⁶ H.H. Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599.

In short, the behaviour of states is in practice determined by several factors. International law is not the only factor. Regardless of which factor determines the conduct of states, those who lead or advise the governments in those states may not ignore the rules of international law, lest they jeopardize the self-interest of those states.

5.2 The effectiveness of international law

Hans Kelsen, another proponent of the positive-law school of jurisprudence, said that a law that is not obeyed is not effective. He even said that “law is a coercive order.”⁹⁷ He wrote:⁹⁸

[I]t cannot be denied that a legal order is considered to be valid only if human behaviour to which this order refers is, by and large, in conformity with the order. If this conformity – in whatever way it may be brought about – is termed ‘effectiveness,’ then effectiveness is a condition of the validity of law.

Thus, international law, because it is applied inconsistently, would not qualify as ‘law’.

True, the rules of international law are not always obeyed, but the same could be said of rules in municipal law. And notwithstanding the not-always consistent application of international law by states, rules of international law are proliferating, more than they ever did before, yet there is no evidence that cases of state non-compliance with those rules are increasing as much.

In fact, in the absence of a central enforcement agency, states apply international law far more than the relatively few instances where they ignore it. As Henkin remarked in an oft-quoted passage, “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all the time”.⁹⁹

States tend to depart from the rules of international law only where interests seen as vital to them are at stake.¹⁰⁰ Although

⁹⁷ H. Kelsen, *General Theory of Law and State* (Transaction Publishers 1949) 19; H. Kelsen, ‘Sanctions in International Law Under the Charter of the United Nations’ (1946) 31 *Iowa Law Review* 499.

⁹⁸ See H. Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (Lawbook Exchange 2013) 290.

⁹⁹ L. Henkin, *How Nations Behave* (Columbia University Press 1979) 47.

¹⁰⁰ Shaw op cit 9.

violations of certain rules of international law have been spectacular, such as North Korea's longstanding ignorance of UN resolutions, there is a wide range of areas in international law where states abide by the rules and which do not attract the same media coverage.

In those instances, if compliance was a criterion for judging whether a legal system qualifies as law, international law would pass the test with flying colours.

6. Is international law Eurocentric?

Jurists from Africa did not contribute a great deal to the idea of international law. But if there is an area where their thoughts have had a visible impact is when they expose the Eurocentricity of international law. International law's origins in European Christian civilization is one manifestation of that Eurocentrism. Due to its origins in the 18th century, international law has a patently Western character. Jouannet says that international law has a Western character by its rational systematization, which is typical of European countries that attempt to impose order to what is perceived as a disorganized international society and disordered national societies.¹⁰¹

The influence of Western Europe on international law was more than intellectual, it was powerfully ideological. Bedjaoui, an Algerian former Judge of the International Court of Justice, summed up that ideology in geographical, moral, economic, and political terms. The ideology underpinning classical international law is premised on *Europe* as its geographical centre, *Christianity* as the religious and moral basis for civilization, *capitalism* as an economic motivation innate in humans, and *imperialism* as an inescapable political aim.¹⁰²

Eurocentricism is an important question when studying the nature of international law. It is a running theme in this book: How can a developing state use international law to its advantage, considering that much of the rules of international law has been adopted, interpreted and enforced for the benefit of advanced

¹⁰¹ Jouannet op cit 22.

¹⁰² See M. Bedjaoui, 'Poverty of the International Order' in R. Falk et al (eds), *International Law: A Contemporary Perspective* (Westview 1985) 153. See also M. Mutua op cit 33.

Western nations? This is a theme I discuss throughout this piece of work.

7. International law as a tool for interpretation of national law

Another area where the continent has developed the general understanding what international law consists of is in using international law as a tool for interpreting municipal law. Namibia and South Africa represent prominent examples of this trend.¹⁰³ Here, international law is not merely a ‘body of rules and principles that regulate the behaviour of states in their relationships between one another, as well as some of their relationships with persons, natural or juristic’. Rather, international law now works as *a set of rules guiding the interpretation of the legal rules and principles contained in the domestic legal system*. Take the case of *Swart v Tube-O-Flex*: The Supreme Court of Namibia relied on Recommendation 198 of the International Labour Organization (ILO) to interpret Namibian Labour Act.¹⁰⁴

7.1 Human dignity

In *Corporal Punishment by Organs of State*, the Supreme Court of Namibia interpreted the right to dignity as provided in Article 8 of the Constitution. In that case, the Attorney-General took advantage of his powers in terms of Article 79(2),¹⁰⁵ read together with Article 87(c), of the Constitution to determine the question as to whether the infliction of corporal punishment in government schools is consistent with the right to dignity enshrined in Article 8 of the Constitution.¹⁰⁶

The Court relied on international law to make sense of the right to dignity and determine whether corporal punishment in public schools violated that right. In doing so, it quoted Sieghart’s *The*

¹⁰³ On South Africa’s use of international law as an interpretive aid, see E.R. George, ‘International Law and African Judiciaries: The Example of South Africa’ (2010) 104 American Society of International Law Proceedings 104, 329.

¹⁰⁴ *Swart v Tube-O-Flex Namibia (Pty) Ltd* [2016] NASC 15 [39]. The Supreme Court was interpreting provisions of the Labour Act, 11 of 2007.

¹⁰⁵ The combined effect of these provisions is to empower the Attorney-General to request the Supreme Court to act as a court of first instance to hear and determine a constitutional question referred to the Court by the Attorney-General.

¹⁰⁶ The *Corporal Punishment* case.

International Law of Human Rights. And in a well-known passage of the judgment, Mahomed AJA said that:¹⁰⁷

The question as to whether a particular form of punishment authorised by law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court. It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further *having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share*.

The learned held that the provisions of Article 8 of the Constitution “articulate the temper throughout the civilised world which has manifested itself consciously since the Second World War”.¹⁰⁸

Interestingly, the Supreme Court resorted to international law without any express reference to Article 144 of the Constitution, which forms the constitutional basis for the domestic application of international law in Namibia. The absence of any reference to Article 144 may be blamed on the youth of the Supreme Court and the judges’ relative unfamiliarity with the provisions of the Constitution at the time that judgment was handed down. But the possibility that the judges left out Article 144 deliberately because they were not directly applying any rules of public international law as such but using them to enlighten the meaning of a provision in the national constitution.

7.2 Freedom of speech and expression

In *Kauesa*, the High Court of Namibia interpreted the constitutional protection of freedom and expression.¹⁰⁹ The Constitution protects that freedom in Article 21(1) (a) of the Constitution. The Court also referred to international law in construing freedom of speech and expression. O’Linn J held

¹⁰⁷ *ibid* at 188D-E.

¹⁰⁸ *ibid* at 188F.

¹⁰⁹ *Kauesa*.

formulated the following principle of constitutional interpretation in light of international law:¹¹⁰

The specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law. However, ... [i]n cases where the provisions of the Namibian Constitution are equivocal or uncertain as to the scope of their application, such provisions of international agreements must at least be given considerable weight in interpreting and defining the scope of the provisions contained in the Namibian Constitution.

7.3 Free legal aid

While both *Corporal Punishment* and *Kauesa* are instances where the Namibian courts used international law to construe terms of the *Constitution*, there are also cases that used it to make sense of provisions in a *statute*. It is arguable whether *Mwilima* provides just such an example. In *Mwilima* the Supreme Court appears to have simply observed that the Legal Aid Act 29 of 1990 did not give effect to an international agreement Namibia ratified (i.e., the International Covenant on Civil and Political Rights). You can however argue that, in arriving at the conclusion that the Act was not in tune with the Covenant, the Court interpreted the provisions of the Act.

It is nonetheless beyond question that the court in *Mwilima* carefully analysed the provisions of the Constitution,¹¹¹ the International Covenant on Civil and Political Rights,¹¹² and the Legal Aid Act.¹¹³ This factor could tilt the balance towards a conclusion that *Mwilima* illustrates the practice of some courts in Namibia that applied international law to interpret domestic legislation.

The accused had applied for legal aid and the court's task was to determine whether the state had an obligation to provide such aid. In the process of 'interpreting' the Constitution, the Covenant and the Legal Aid Act, the court held:

¹¹⁰ *ibid* at 141A-C.

¹¹¹ Article 12 (fair trial, include free legal aid), Article 95(h) (policy on just legal system, which includes free legal aid), and Article 101 (on the non-binding nature of Chapter 11 of the Constitution, which includes Article 95(h)).

¹¹² 14(3) (d) (rights of the accused during trial, including free legal aid).

¹¹³ Section 10(2) (the powers of the Director of Legal Aid to grant legal aid), and sections 4 and 5(a) of the Legal Aid Amendment Act 17 of 2000.

The present case illustrates the difference [between legal aid under the Act and legal aid under the Covenant]. Under statutory legal aid there would not be an obligation on [Government of the Republic of Namibia] if the resources provided under the Legal Aid Act were not sufficient. However, if the interests of justice require that those of the applications who cannot afford legal representation should be legally represented such an obligation to provide such representation for them would arise from the provisions of art 14(3) (d) of the Covenant which is not qualified by the availability of resources.

In short, the difference between the Legal Aid and the Covenant was that the Act subjected the granting of free legal aid to the economic or financial resources of the state while the Covenant subjected the granting of legal aid to the “interests of justice”. Thus, in applying international law to a domestic statute, the Supreme Court of Namibia concluded that the Act did not conform to the Covenant and that the state had an obligation to provide legal aid to the accused in the interest of justice.

7.4 Hate speech

While it is doubtful whether the court in *Mwilima* deployed international law to interpret a domestic statute, *Kauesa* leaves no doubts as to its application of international law in the construction of domestic legislation. In *Kauesa*, the High Court of Namibia used international treaties to interpret sections 11(1)(b) and 14 of the Racial Discrimination Prohibition Amendment Act 26 of 1991, which create a serious criminal offence when a person uses hate speech based on race. As O’Linn J wrote:¹¹⁴

When the provisions of s 11(1)(b) read with s 14 of the Racial Discrimination Prohibition Amendment Act 26 of 1991 (Nm) are seen in the context of the Namibian Constitution, the modern constitutions and/or criminal codes of so-called civilised countries and *international treaties and conventions*, it can safely be that this provision clearly falls within the aims and objectives not only of the Namibian Constitution and people, but is also in line with constitutions and/or penal codes of many other democratic countries and *international treaties and conventions*.

¹¹⁴ *Kauesa* at 150D-E.

THE EUROPEAN ROOTS OF MODERN INTERNATIONAL LAW

According to some urban legend, one Dutch queen got frustrated when she noticed a statue of Jesus Christ in the Peace Palace in The Hague. She wondered whether the presence of the Christ meant that the royal-décor building was only accessible to Christians.¹¹⁵ The Peace Palace houses two symbolic institutions of international law, namely the International Court of Justice (ICJ) and the Permanent Court of Arbitration. There is indeed great symbolism from the statue of Jesus Christ in the building housing the most important court in public international law (i.e., the ICJ) and from the location of that building in the Netherlands.

While it is easy to dismiss this story as anecdotal, it actually goes beyond symbolism and tells something about the origins of international law. As I show in this chapter, the history of modern international law is steeped in Western European Christian civilization. This may sound odd given that the legitimacy of international law is plausibly based on the claim that international law is blind to political agendas and the transcendental truth advocated by religions.¹¹⁶

In this part of the book, I relate the history of international law in general. Specifically, I zoom in on the early jurists who developed international law and five historic milestones in the evolution of international law. Those early writers include Hugo Grotius, Bynkershoek. Yet, as I point out in this chapter, many early writers mistakenly traced the genesis of international law to the writings of

¹¹⁵ See K. Patel, 'Photo Essay: Postcards From the Peace Palace' (Daily Maverick 2017) Available at https://www.dailymaverick.co.za/article/2013-08-30-photo-essay-postcards-from-the-peace-palace/#.WaSwiMYo_IU.

¹¹⁶ See J.D. Haskell, 'The Scandal of Disenchantment: Blind Spots in Modern Anglo-American Approaches to the History and Politics of International Law' (2013) 44 The University of Memphis Law Review 39.

the Greeks and Romans.¹¹⁷ In other words, they falsely claim that Europeans invented international law.

As to the historic milestones, the most important include the Thirty Years War and the Peace of Westphalia, the Vienna Conference, the Berlin Conference, the League of Nations, and the United Nations. I will show that official history of international law is theoretically political in the sense that it can be viewed from different perspectives.

The European origins of modern international law have carry two far-reaching implications for the application of international law in Namibia: One, the proclaimed universality of international law should no longer be taken for granted; two, international law evolved as an essential part of colonial expansion; and, three, the racial hierarchy on which the Eurocentricity of international law is premised will sometimes put the application of international law on a collision course with other key values and provisions of the Constitution. The realisation of the European focus of international law's historical development should prompt Namibian judges to take a more critical approach to international law. The courts, just like the country's leadership, have for long embraced the 'Namibia-as-child-of-international-solidarity' narrative or adopted a 'friendly' approach to international law. This stance has surprised many observers who had expected a much less accommodating attitude from Namibian leaders and lawyers.

1. The European influence

International law used to be known as 'the law of nations' initially. It is the British jurist Jeremy Bentham who in 1790 gave that discipline the name 'international law'.¹¹⁸ Today, the discipline is referred to by those two names.

Most mainstream textbooks on international law affirm that modern international law originates in Western European culture and

¹¹⁷ W.E. Butler, 'Periodization and International Law' in A. Orakhelashvili (ed.) *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 381-382.

¹¹⁸ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Burns and Hart 1970) 296.

politics (e.g., Gozzi,¹¹⁹ Shaw;¹²⁰ Jouannet).¹²¹ International law at that time was deeply influenced by Christianity and applied mostly in Christian Europe. As Shaw¹²² put it, the bases of international law “lie firmly in the development of Western culture and political organisation.” By “Western culture”, he certainly meant West European culture and politics.

Following his historical study of international law, Gozzi found that 19th-century international law was forged entirely in Europe.¹²³ Other scholars even stress that, up to this day, international law has retained its distinctly (Western) Christian core.¹²⁴ While these statements are fairly accurate as far as *modern* international law is concerned, international law – in an essential sense – can hardly be said to be a European invention as countless political communities across the globe, including Africa, entered into treaties and alliances with other communities before the advent of the modern state and the spread of European norms throughout the globe in the 16th and 17th centuries.¹²⁵ It was not until the end of the 19th century that international law arose as a reflection of “global society”, when the Ottoman Empire, China and Japan were forced into the regional international society that gravitated around Europe.¹²⁶

Moreover, the development of international law was substantially advanced through the debates between the proponents of natural law¹²⁷ and positivism.¹²⁸ Although that debate still rages on, it has made a substantial contribution to the growth of international law.

¹¹⁹ G. Gozzi, ‘History of International Law and Western Civilization’ (2007) 9 International Community Law Review 353.

¹²⁰ M. Shaw, *International Law*, (6th edn Cambridge University Press) 13.

¹²¹ E. T. Jouannet, *A Short Introduction to International Law* (Cambridge University Press 2014) 4.

¹²² M. Shaw op cit 13.

¹²³ G. Gozzi op cit 353.

¹²⁴ J.D. Haskell, ‘The Scandal of Disenchantment: Blind Spots in Modern Anglo-American Approaches to the History and Politics of International Law,’ (2013) 44 The University of Memphis Law Review 39.

¹²⁵ M. Janis op cit 1.

¹²⁶ G. Gozzi op cit 353, 354, and 361.

¹²⁷ Thomas Aquinas maintained that natural law is God’s law and Hugo Grotius who is regarded the father of international law, to name but two.

¹²⁸ Jeremy Bentham, whose contributions challenged natural law, also came up with the division between public and private international law and defined international law as concerned with transactions between sovereigns.

Many early rules of international law come from Roman law and canon law. Both these sources drew from the principles of natural law.

The rules and principles of Roman law and canon law that informed much of international law were also found in the European states that arose as the Middle Ages were drawing to a close and as that historical period was replaced by the Renaissance. These two substantive sources of law were heavily relied upon by statesmen and diplomats as they started to develop what can be seen as modern international law.

2. The jurists who developed international law

2.1 The early origins

Egyptians, Jews, Greeks, and Romans originated the early international law rules and agreements. These early treaties, including the peace treaty between Ramses II of Egypt and the king of the Hittites,¹²⁹ were confined to certain geographical regions and cultures.¹³⁰ At that time, there was not yet a conception of an international law applicable to all states within a specified legal framework.¹³¹ There is also evidence of peace treaties and alliances that the Jews entered into with the Romans, Syrians and Greeks.¹³²

The contribution of the Greeks in the 6th century before Christ (BC) would be defining for European thought and international law. That contribution would first spread in Europe and would be reflected in the norms of international law. Classical Greece contributed to European thought and international law by adding its distinctive critical and rational approach to issues, its permanent analysis and questioning, and its argumentative inclinations, among other things. The Greeks contributed their philosophical and scientific approach to questions¹³³ and they developed the practice of connecting city-states through treaties within sophisticated network

¹²⁹ Also known as the *Eternal Treaty* or the *Silver Treaty*.

¹³⁰ D. Bederman, *et al*, *International Law in Antiquity* (1st edn, Cambridge University Press 2007) 26-27.

¹³¹ M. Shaw *op cit* 15.

¹³² M. Janis *op cit* 1.

¹³³ G. Von Glahn, *Law among nations. An introduction to public international law. Second edition*, (1st edn, Macmillan Co.; Collier-Macmillan 1970) 25.

of commercial associations.¹³⁴ The Greeks, however, did not bequeath to humankind a tradition of an international law or law of nations of universal application.

The Romans, by contrast, developed a sense of the universality of what they called *jus gentium*, the law of nations.¹³⁵ Gaius, for example, wrote that there exists a law that is “common to all men”, a universal law that could be applied by the courts in cases involving foreign nationals.¹³⁶ The Romans are the originators of the idea of an “international community”.¹³⁷

In addition, many documentary records exist that proves that an “international system” prevailed in East Asia as early as first century BC. It was an international system backed up by the Chinese military, economy and culture, which were then predominant in the region.¹³⁸ That Chinese-dominated East Asian international system was ‘tributary’ in the sense that it regulated the relationships between an overlord, the Chinese emperor, and his subjects in a *de facto* state-controlled international trading system.¹³⁹ This evidence reveals that Europeans did not invent “international” law and that, before they impregnated international law with their values, interests and approaches, some earlier forms of international normative system were dominated by other nations, whether Roman or Chinese.

2.2 The Spanish and Italian writers

Early writers on international law were Spanish and Italian. The Spanish writers include Francisco de Vitoria and Francisco Suarez. Vitoria was one of the first jurists to proclaim the universality of

¹³⁴ M. Shaw op cit16.

¹³⁵ J. O'Brien. *International Law* (Cavendish Publishing Limited 2001) 2 – 28.

¹³⁶ G. Von Glahn op cit 25.

¹³⁷ E.A. Karakulian, ‘The Idea of an International Community in the History of International Law’ (2016) 1 *Jus Gentium: Journal of International Legal History* 581-582.

¹³⁸ K. Akashi, ‘(Re-)Examination of the Eurocentric Story of International Law Through the Japanese Experience’ (2013) 107 *American Society of International Law: Proceedings* 380.

¹³⁹ *ibid*.

international law.¹⁴⁰ Among the Italian scholars, is Alberico Gentili, who authored *De Jure Belli* (On the Law of Wars) in 1598.¹⁴¹

2.3 Hugo Grotius and other Dutch jurists

These early writers were succeeded by Dutch jurists in the doctrinal development of international law. The Dutch jurist Hugo Grotius (1583-1645) is generally regarded as the father of modern international law. He published *Mare Liberum* (1609), in which he propounded the freedom of the seas, which is widely regarded today as a foundational principle of international law.

Grotius also published his *De Jure Belli ac Pacis* (*The Law of War and Peace*) in 1625. This book is seen as one of the earliest attempts to offer a comprehensive and systematic coverage of international law.¹⁴² *De Jure Belli ac Pacis* is generally seen as a classic work of modern international law.¹⁴³ Grotius sought to build a just international legal order.

In particular, Grotius also had an influence on the law of South West Africa/Namibia. He is one of the classical authorities in Roman-Dutch law and his writings on various areas of the law made his way to Namibia through South Africa after the latter extended its legal system to Namibia in 1919.¹⁴⁴

Cornelius van Bynkershoek, another Dutch jurist, had a profound impact on the development of international law. He insisted on the consent of states, expressed either through treaties or custom, as the basis of international law.¹⁴⁵

¹⁴⁰ C. McKenna, 'Francisco de Vitoria: Father of International Law', (1932) 21(84) *Studies: An Irish Quarterly Review* 635-648.

¹⁴¹ B. Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment' (1998) 92(4) *The American Journal of International Law* 713-723.

¹⁴² T. Buergenthal op cit 13. Also see H. Boukema 'Grotius' Concept of Law' (1983) 69(1) *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, 68-73.

¹⁴³ M. Janis op cit 1.

¹⁴⁴ See chapter 7 of this book for more information on the extension of the South African legal system to Namibia.

¹⁴⁵ C. Phillipson, 'Cornelius van Bynkershoek' (1908) 9(1) *Journal of the Society of Comparative Legislation* 27-49.

2.4 Later scholars

There were contemporaries of Grotius who significantly participated in the development of international law. Then, in the 20th and 21st centuries, scholars have put forward new theories to explain the nature of international law. For instance, Guzman put forth the theory that the notions of reputation, retaliation, and reciprocity explain the behaviour of states on the international stage. Trachtmann uses economics as an analytical method to examine issues pertaining to international law. However, the international community is yet to find a theory that would adequately explain the nature of international law.

3. The historical milestones

The historical development of modern international law has been marked by a number of milestones. These are the Peace of Westphalia in 1648, the Congress of Vienna in 1815, the Berlin Conference in 1884, the League of Nations, and the United Nations.

While these points in the history of international law are well known, the interpretation of these milestones varies, depending on the perspectives adopted. Indeed, these various watershed events in the past can be viewed through several prisms. Notably, one perspective that spontaneously come to mind is that international law developed through guns and blood. The period that preceded the creation of the United Nations was characterized by major wars. An alternative viewpoint is that the pre-United Nations period led to conflict whenever the protagonists could not cooperate, negotiate and create peace-preserving institutions. A third alternative would emphasize on the fact that questions of ideas and identity were prominent at the time modern international law was born and that the Thirty Years War, which ultimately gave rise to modern international law, was essentially a religious war. I will consider these perspective where appropriate in this outline of the historical evolution of international law.

3.1 The Peace of Westphalia

Several scholars cite the Treaties of Westphalia of 1648 as the time when modern international law emerged.¹⁴⁶ The Treaties put an end to the Thirty Years War (1618-1648), which brought Europe to its knees. The war was of such “unprecedented ferocity” that it led Grotius to write his famous *De Iure Belli ac Pacis*, a book on war and ways to contain it.¹⁴⁷ At that time, classical international law and the laws of war (or humanitarian law) would be intimately linked and would be one of the most prominent branches of international law.¹⁴⁸

The Peace Treaties of Westphalia set a framework for peace and cooperation in Europe that lasted for many decades.¹⁴⁹ The basis for the multi-state negotiations that would characterize international law was laid at the conferences that culminated in the adoption of the two treaties constituting the Peace of Westphalia.¹⁵⁰ These treaties in turn laid down the principle of *pacta sunt servanda* (agreements must be honoured), which forms one of the core principles of international law.

The emergence of the modern state in the 16th and 17th centuries made it necessary to have a law that would regulate states.¹⁵¹ It is the advent of the modern state that made international law a distinct and separate legal system. International law really began to expand globally with the spread of the Westphalian state model outside Europe.¹⁵² It should be noted, however, that the rules regarding the exchange of diplomats and some other rules of international law existed before the 16th century and date back to Antiquity.¹⁵³ That is,

¹⁴⁶ R. Lesaffer, ‘The Classical Law of Nations (1500-1800)’ in A. Orakhelashvili (ed.) *Research Handbook on the Theory and History of International Law* (Edgar Elgar, 2011) 408-408. (Often indicated as the very birth certificates of the classical law of nations that preceded and preconfigured modern international law).

¹⁴⁷ E. T. Jouannet, *A Short Introduction to International Law* (Cambridge University Press 2014) 12.

¹⁴⁸ E. T. Jouannet op cit 12-13.

¹⁴⁹ R. Lesaffer, ‘The Classical Law of Nations (1500-1800)’ in A. Orakhelashvili ed., *Research Handbook on the Theory and History of International Law* (Edgar Elgar 2011) 414.

¹⁵⁰ R. Lesaffer op cit 413.

¹⁵¹ J. O’Brien op cit 3.

¹⁵² C. Focarelli, ‘International Law in the 20th Century’ in A. Orakhelashvili ed., *Research Handbook on the Theory and History of International Law* (Edgar Elgar 2011) 478.

¹⁵³ M. Shaw op cit 14.

several rules of international law predated the Westphalian state model that surfaced in the 16th century. In particular, Ramses II of Egypt is recorded to have entered into a peace treaty with the king of the Hittites.¹⁵⁴ The 16th century and the rise of the Westphalian state model nonetheless mark the time in history when international law emerged as a *distinct* body of rules and principles.

The purpose of international law was, then, to provide for the rights and obligations of states, which were seen as the only subjects of international law.¹⁵⁵ International law was initially applied to a small group of European and American states that saw themselves as ‘civilized’ and as capable of acquiring rights and obligations.¹⁵⁶ It excluded three quarters of the globe, discriminating against them for three centuries.¹⁵⁷ This discriminatory attitude is part of the history of international law; it legitimized and paved the way for the subjugation and colonization of the rest of the globe and for the violence that accompanied it.¹⁵⁸ From that time onwards, European and American legal systems would spread and impose themselves on the rest of the world through the use of force, especially in the form of colonisations. Eventually, Roman-Dutch law would arrive in South West Africa/Namibia through South Africa’s administration and colonial occupation of South West Africa/Namibia.

International law at the time was based on equality only for the civilized nations of Europe and America and on force, subjugation and inequality for the uncivilized or less civilized rest of the planet.¹⁵⁹ The Eurocentric and racist assumptions of international law began to be challenged after World War II. Following the establishment of the United Nations in 1945, especially the convention of the Bandung Conference in 1955,¹⁶⁰ these assumptions would be challenged more forcefully.

¹⁵⁴ *ibid.*

¹⁵⁵ J. Dugard, *International Law: A South African Perspective* (Juta & Co, Ltd 2011) 1-2.

¹⁵⁶ E. T. Jouannet *op cit* 4-5.

¹⁵⁷ *Ibid* 5.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid* 18-19.

¹⁶⁰ M. Mutua, ‘What is TWAIL?’ (2000) 94 American Society of International Law Proceedings 31 (stating that resistance to official accounts of international law could be traced back to the Bandung Conference in 1955).

3.2 The Congress of Vienna

The Congress of Vienna¹⁶¹ put an end to the Napoleonic Wars in 1815. It established a sophisticated system of economic cooperation in Europe, and established a vast body of rules of international law that substantially contributed to the discipline.¹⁶² It also provided for the principle of free navigation on international rivers traversing Europe, and it condemned the slave trade. The system endured until World War I broke out in 1914.

3.3 The Berlin Conference

The Berlin Conference took place in 1884. During that conference, the European powers carved up Africa in what was called the “scramble for Africa”. England, France, Portugal, Belgium, and Germany declared different parts of Africa as their colonies or protectorates.¹⁶³ South West Africa/Namibia was proclaimed as a German protectorate.

Studying the Berlin Conference is of the utmost importance for an understanding of colonialism in Africa and Namibia in particular. Crucially, this episode in world history reveals how the European colonial enterprise moulded national states and international institutions such as the League of Nations and the United Nations.¹⁶⁴

3.4 The League of Nations and the mandate system

The end of World War I (1918) was sealed in the Treaty of Versailles. The Treaty of Versailles incorporated the Covenant of the League of Nations. The League of Nations was created in 1920 when

¹⁶¹ A. Osiander, *The States System of Europe (1640-1990): Peacemaking and the Conditions of International Stability* (Oxford 1994).

¹⁶² G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Orders* (Cambridge 2004).

¹⁶³ M. Rosenberg, ‘Berlin Conference of 1884-1885 to Divide Africa; The Colonization of the Continent by European Powers’ (2016) Retrieved from <http://geography.about.com/cs/politicalgeog/a/berlinconferenc.htm> accessed on 17/02/2017.

¹⁶⁴ See A. Anghie, ‘Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations’ (2002) 34 New York University Journal of International Law and Politics, 515-516 (arguing that colonialism profoundly shaped the character of international institutions at their formative stage and that, by analysing the history of how this occurred, the operations and character of contemporary international institutions will make more sense).

its Covenant entered into force.¹⁶⁵ The League of Nations marked the first time the international community set up an intergovernmental institutional framework for the settlement of political disputes and the maintenance of international peace and security.¹⁶⁶ The League of Nations also established the Permanent Court of International Justice (PCIJ), which is the first international court capable of hearing matters brought by and involving all states in the world.¹⁶⁷ The League of Nations enriched international law in these and other aspects. Notably, it contributed to the emergence of modern international law and set important precedents.

Most relevantly, the League of Nations created the mandate system which put Namibia and other countries under the administration of powerful states. The League of Nations was the international institution entrusted with the mission of transforming colonial territories into independent sovereign states.¹⁶⁸

The Mandate for South West Africa conferred a mandate on “His Britannic Majesty” “the territory which formerly constituted the German Protectorate of South West Africa”.¹⁶⁹ It also provided that the Union of South Africa would carry out the mandate on behalf of the British Crown.¹⁷⁰

Despite its trailblazing beginnings, the League of Nations could not stop the outbreak of World War II due to many contributing factors. The League was eventually dissolved in 1946 and replaced by the United Nations.

3.5 The United Nations

The United Nations built on the foundations laid by the League of Nations. It was set up in 1945 in the wake of the end of World War II. Historically, this was a watershed moment as international

¹⁶⁵ O’Brien op cit 23-24.

¹⁶⁶ Dictionary of American History, *League of Nations*, The Gale Group Inc. 2003. Retrieved from <http://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/united-nations/league-nations>. Accessed on 17/02/2017.

¹⁶⁷ E. D. Dickinson, *A League of Nations and International Law* (1918) 12(2) *American Political Science Review* 304-311.

¹⁶⁸ A. Anghie op cit 514.

¹⁶⁹ Article 1 of the Mandate for South West Africa.

¹⁷⁰ *ibid*.

law reflected a much larger community of nations than at any other times before.¹⁷¹ It became accurate to describe the United Nations system as a faithful reflection of the international community, with international law as its primary instrument.

The United Nations adopted numerous treaties and resolutions that left a lasting imprint on the field and that significantly expanded it. Evident from the information in this chapter, international law today is a product of its discriminatory past and contemporary influences, like the Cold War, competition among superpowers, and the incredible legislative production of the United Nations. Yet, though it suffers from many important weaknesses, the United Nations is arguably the institution that most developed modern international law.

I cover the United Nations in greater detail in Chapter 13

4. Major implications for Namibian law

The far-reaching footprint of Europeans on international law implies that the international law that Article 144 of the Namibian Constitution makes part of Namibian law is viscerally European, in its outlook as well as in its content. This legacy means that Namibian courts, when applying international law in domestic cases, shoulder the responsibility to imbue international law with a distinctly Namibian approach and with Namibian values. The judgment in *Ex parte Attorney General re Corporal Punishment* offers the legal basis for this enterprise. In that case, the Supreme Court of Namibia referred to international law in interpreting the right to dignity as enshrined in Article 8 of the Constitution. In interpreting the Constitution, the

¹⁷¹ G. Gozzi, 'History of International Law and Western Civilization' (2007) 9 *International Community Law Review* 368.

court blended the recourse to international law with the norms, aspirations and expectations of the Namibian people.

SOURCES OF INTERNATIONAL LAW

One defining particularity of the Namibian legal system is that international law is one of the formal sources of Namibian law. And, to ascertain the content of international law, lawyers in Namibia must draw such content from the formal sources of international law. However, finding international law is, unlike municipal law, much harder. Changes to the international community since the creation of the United Nations in 1945 have led to fundamental disputes on the sources of international law.¹⁷² For one thing, debates emerged concerning which rules have graduated to the status of international custom. As Brownlie observed, in international law, you are “faced with the problem of discovering where the law is to be found and how [you] can tell whether a particular proposition amounts to a legal rule.”¹⁷³ After research and inquiry, you can ascertain that a rule emanates from one or more of the following sources: treaties, custom, the principles of law recognized by the major legal systems, judicial decisions or doctrinal writings.

1. The standard analytical framework

For an international court or forum to apply international law, parties to a dispute must prove that a given rule of international law emanates from one, or more, of three law-creating processes: treaties, international custom or the general principles of law recognised by major legal systems.¹⁷⁴ Article 38(1) of the Statute of the International Court of Justice (hereinafter ‘ICJ Statute’) enumerates the formal sources of international law. But it bears mentioning that the sources of the international law applicable specifically to regional groupings

¹⁷² See, for example, M.Y.A. Kadir, ‘The United Nations General Assembly Resolution (UNGAR) as a Source of International Law: Toward a Reformulation of Sources of International Law’ (2011) 8 Indonesian Journal of International Law 275.

¹⁷³ Brownlie op cit 66.

¹⁷⁴ G. Schwarzenberger, *International Law* (Stevens & Sons 1957) 26-77.

such as the African Union¹⁷⁵ or the Southern African Development Community (SADC)¹⁷⁶ may depart more or less from Article 38(1) of the ICJ Statute. The sources of law for the Court of Justice of the African Union are:¹⁷⁷

- (a) The [Constitutive] Act [of the African Union];
- (b) International treaties whether general or particular, establishing rules expressly recognized by the contesting states;
- (c) International custom, as evidence of a general practice accepted as law;
- (d) The general principles of law recognized universally or by African States;
- (e) Subject to Article 37 of this Protocol, judicial decisions and the writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union as subsidiary means for the determination of the rules of law.

That said, Article 38(1) of the ICJ Statute is the most authoritative statement of the formal sources of international law. Even though the Statute was initially meant to serve as guide of the formal legal sources for the International Court of Justice, today it is widely accepted as the most authoritative statement of the formal sources of international law for anyone seeking to identify and apply rules of international law.

Article 38(1) reads:

The Court, whose function is to decide in accordance with international such disputes as are submitted to it, shall apply:

¹⁷⁵ See Article 31 of the Protocol on the Statute of the African Court of Justice and Human Rights (which replicates Article 38(1) of the ICJ Statute, except that it adds the Constitutive Act of the African Union as the first source in its lists of applicable law).

¹⁷⁶ See Article 21 of the Protocol on Tribunal in the Southern African Development Community (the SADC Tribunal Protocol hardly replicates Article 38(1) of the ICJ Statute, but it has regard to “the general principles and rules of public international law” in developing “its own Community jurisprudence”).

¹⁷⁷ Article 20 of the Protocol of the Court of Justice of the African Union, 2003.

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This article was first written in 1920 for the Statute of the Permanent Court of International Justice. It was meant to specify the sources of law that the Permanent Court of International Justice was supposed to apply in the determination of rules of law. Article 38(1) was later incorporated into the Statute of the International Court of Justice for the same purpose, with the necessary adjustments.

According to Article 38(1), the sources of international law are therefore treaties, custom, and the general principles of civilized nations. It follows that any rule that does not come from any of those three sources would not be regarded as a *binding* rule of international law.¹⁷⁸ Since formal sources categorize rules as belonging to one or the other field of law, the formal sources of international law determine which rules form part of international law. However, as I explain later in this chapter, over the years, the sources of international law have evolved beyond Article 38(1) to include ‘new’ sources such as peremptory norms, resolutions of international organizations and various forms of soft law.

Whether judicial decisions and doctrinal writings are sources of international law is a highly debatable issue. These ‘sources’, unlike treaties and custom, do not have a basis in the consent of states. (Note that ‘general principles of civilized nations’ also count as non-consensual sources of international law) They are subsidiary sources of international law in the sense that lawyers will consider judicial

¹⁷⁸ G. Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar 2012) 49 (stating that, while the behaviour of some international courts and the opinions of some scholars suggest otherwise, a “binding set of international rules” must be rooted in treaties, custom or general principles). See also American Law Institute (1987) 102 Restatement of the Foreign Relations Law of the United States (Third) § 1.

decisions and doctrinal writings only as evidence that a certain norm has been accepted as a rule of international law.¹⁷⁹

Since 1945, international law has evolved. Like I point out in this chapter, Article 38(1) no longer exhausts all the possible sources of international law. It nonetheless remains the standard analytical framework for sources of international law. Besides, new developments in international law are still being viewed and categorized according to that framework.

Article 38(1) does not provide a hierarchy of sources. Some jurists have tried to argue that treaties, custom and the general principles of law are the only sources of international law and that judicial decisions and doctrinal writings are only useful in that they verify rules that a court, a lawyer or another person claims is part of international law.¹⁸⁰ This argument translates the distinction between formal sources and material sources. Formal sources are those given a particular rule its validity or authority – treaty, custom, and general principles – whereas material sources are evidence that may be used to prove that a particular rule has a formal source, for example judicial decisions and the writings of publicists.¹⁸¹

In practice, treaties and custom are hierarchically equal,¹⁸² although treaties tend to be regarded as the primary source of international law. The much clearer character of written texts may account for the relative primacy of treaties in international law. Recently, however, peremptory norms (*ius cogens*) have been treated as higher norms that supersede both treaties and custom.

¹⁷⁹ American Law Institute op cit 1; *The Paquete Habana* (1900) 175 U.S. 677.

¹⁸⁰ Brownlie op cit 67

¹⁸¹ G. Boasop cit 46-47.

¹⁸² *ibid*.

2. Treaties

A treaty is a written document between two or more states that binds those states after they have signed (or ratified) it. The Vienna Convention on the Law of Treaties of 1969 governs the rules and procedures relating to treaties. The same holds for the Vienna Convention on the Law of Treaties Between States and International Organizations and Between International Organizations, which was adopted in 1986. In the *South West Africa Cases*, one of the questions the International Court of Justice had to decide was whether the Mandate for South West Africa was a treaty. The Court held that the Mandate for South West Africa was “in fact and in law” a treaty, though South Africa disputed this position.¹⁸³ South Africa argued that, as a consequence of the League of Nations’ dissolution, the Mandate could no longer be viewed as “a treaty or convention in force”.¹⁸⁴

With reference to their nature, treaties may be:

1. contractual, for example, trade, investment and extradition;
2. legislative, these treaties codify various aspects of international law; or
3. constitutional, these treaties create international organizations.

Note, however, that a treaty may take on more than one character. Thus, a treaty may be constitutional and legislative. For instance, the African Charter on Human and Peoples’ Rights codifies the rules and principles that apply in the field of human rights in Africa and it creates the African Commission on Human and Peoples’ Rights, an institution tasked with the protection and promotion of human rights on the continent.

Fitzmaurice observes that, considered in themselves, especially in their conception, treaties are formally a source of obligation rather

¹⁸³ *South West Africa Cases (Preliminary Objections)*, *Ethiopia v. South Africa; Liberia v. South Africa*, Judgment of 21 December 1962, I.C.J. Reports 1962, 319. (Hereinafter ‘*SWA cases (Preliminary Objections) 1962*’).

¹⁸⁴ *ibid* 326-327.

than a source of law.¹⁸⁵ Treaties are no more a source of law than an ordinary private law contract.¹⁸⁶ This is arguable. Anyway, treaties are generally treated as a traditional source of international law.

I deal with treaties in depth in Chapter 6.

3. Custom

Sources of international law, with the exception of treaties, share a number of characteristics. The rules emanating from such non-treaty sources tend to be more general in application and less precise than the rules derived from treaties. As a consequence of this, they are more open to disagreements regarding their application and interpretation.

Custom finds its source in the widespread consistent practice of states coupled with the belief (on the part of the acting state) that they are acting out of a sense of legal obligation.¹⁸⁷ When several states act in a consistent manner out of a sense of legal obligation for a long period of time, a new custom is created. It is central to international law. Unlike consent to treaties, consent to customary law is not expressly signified, it is implicit. It is implicit in the conduct of states.¹⁸⁸

As a general principle, once a rule has hardened into customary international law, it binds all states even those that have not expressly accepted. This principle applies for all states, including Islamic states who practice Islamic international law (i.e., *Sijar*).¹⁸⁹ Moreover,

¹⁸⁵ G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' (1958) in *Symbolae Verzijl: Présentées au Professeur J.H.W. Verzijl* 153.

¹⁸⁶ *ibid.*

¹⁸⁷ On custom as a source of international law, see generally International Law Association, Committee on Formation of Customary (General) International Law, London Conference (2000), Available at <<https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf>> Last accessed 2 November 2018.

¹⁸⁸ R. Baker, 'Customary International Law: A Reconceptualization' (2016) 41(2) *Brooklyn Journal of International Law* 444-448.

¹⁸⁹ M.A. Zahid and R. Shapiee, 'Customs as a Source of *Sijar* and International Law: A Comparison of the Qualifying Criteria' (2010) 8 *International Journal of Civil Society Law* 36. (explaining that the qualifying criteria for customary

whether a particular state has consented to a customary rule of international law is an issue that raises hard questions of evidence. These questions of evidence figure prominently in litigation in the field of international law.

There are two notable exceptions to this general principle. The first exception is the persistent objector: a state can avoid a rule of customary international law where it has for a long time objected to that rule. The other exception is local custom: a state may avoid a customary international law rule if that rule applies to *specific* issues or *specific* regions or classes of states that do not concern that state.¹⁹⁰

To prove that a state has consented to a rule of customary international law, that state must prove two things, namely settled practice (*usus*) and acceptance of the rule by the state (*opinio iuris*).¹⁹¹ These requirements follow from Article 38, which describes international custom “as evidence of a general practice accepted as law”.¹⁹²

3.1 Settled practice (*usus*)

Evidence of settled state practice can be found in treaties, diplomatic correspondence, national legislation, historical records,¹⁹³ official statements at international conferences, or other actions taken by a state to address itself to matters of international concern. Even pleadings can serve as evidence of state practice as they constitute comprehensive statements of the opinions of states on special legal questions. Inaction can also be regarded as a form of state practice.¹⁹⁴

Where states have ostensibly shown support for a specific rule of international law, no problem of evidence arises. In most disputes, this sort of ostensible support is lacking.

international law are similar except that *Siyar* requires that the rule presented as part of customary international law do not violate the *Sharia*).

¹⁹⁰ A. D’Amato, ‘The Concept of Special Custom in International Law’ (1969) 63 *American Journal of International Law* 211.

¹⁹¹ H. Thirlway, *The Sources Of International Law* (Oxford University Press 2014) 55-57.

¹⁹² *Asylum Case (Colombia v. Peru)*, I.C.J. Reports 1950, 266.

¹⁹³ Brownlie op cit 78.

¹⁹⁴ *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, § 67 (July 8th).

In the *Asylum Case*, the ICJ enunciated that, in principle, state practice must be ‘constant and uniform’.¹⁹⁵ In the *South West Africa Cases*, Judge Conrادية stated that it is *practice*, and not statements, that serve as evidence of custom.¹⁹⁶

It is often required that some time elapses before a conclusion can be made that a certain practice is regarded as customary rule of international law. However, there is no fixed time frame and the question as to whether a certain rule is reflected through state practice depends on the circumstances of each case and the practice under scrutiny.¹⁹⁷ In some cases, it can take several years before a rule can achieve the status of international custom. Occasionally, a rule can become international custom instantly. An example of this is the General Assembly resolution on the outer space, which became international custom shortly after its adoption by the Assembly.

Another requirement of customary rules of international law is that they must enjoy widespread acceptance. With reference to the North Sea Continental Shelf Case,¹⁹⁸ “[s]tate practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked”.¹⁹⁹ Brownlie contends that, before a practice is to be accepted as indicative of a custom, it must be recognized by the major powers in that field.²⁰⁰ That means that if a rule has to be accepted as custom in the area of trade, the major trading nations must accept it. If a state objects to a rule of international law, while this rule is still in its early stages of development, that state will not be bound by that rule. This is the ‘persistent objector’ exception to the general principle that international custom all states, even those who have not adhered to it.

However, state practice may sometimes be difficult to prove. The difference between state practice that contravenes international custom, state practice that departs from international custom, and

¹⁹⁵ 1950 I.C.J. Reports, 277.

¹⁹⁶ *South West Africa Cases, Second Phase*, 1966 I.C.J. Reports 6, 169.

¹⁹⁷ R. Sabel, *Procedure At International Conferences* (1st edn, Cambridge University Press 1997), 37.

¹⁹⁸ *Germany v Denmark*, ICJ Reports, 1969, 3.

¹⁹⁹ F. Hoof, *Rethinking The Sources Of International Law* (1st edn, Kluwer Law and Taxation 1983) 110-111

²⁰⁰ Brownlie op cit 76

state practice that has replaced old practice with new, is far from clear.²⁰¹ Actually, the determination of the rules of customary law is more art than science.²⁰² Mere experience and expertise in international law do not guarantee that an expert can effectively identify rules of international custom. And it seems like judges and jurists are better at determining whether a certain rule has become part of customary international law.²⁰³

3.2 *Opinio iuris*

For a rule to be part of customary international law, it must be accepted as such by states. Because of the subjective and psychological nature of such acceptance, evidence of *opinio iuris* is difficult to adduce.²⁰⁴

There is a contradiction in the *opinio iuris* requirement. The requirement is that, for a state to be regarded as subjective in accepting a practice as one by which it is bound, it must be proved that there is a belief on the part of that state that is supported by a rule of law requiring that practice. The contradiction arises because a new rule of customary law cannot be created if it is required in the first place that the rule in question be required by law.²⁰⁵

That contradiction takes on the form of a circular argument: 'The question is whether a rule is part of international custom; but to prove that it is part of customary international law, one must prove that it is required by law. This begs the question because whether it is part of law is the question that must be answered in the first place.

An example will clarify this fallacy. Assume that a state party to a dispute wants to prove that rule X forms part of customary international law. How does it prove that? The test for proving that a rule is one of international custom is that the rule under scrutiny must be required by law. This is a contradiction because you cannot prove that a rule belongs to international custom by simply saying that it is required by international custom. That it belongs to

²⁰¹ Janis op cit 45-46.

²⁰² Janis op cit 46.

²⁰³ Janis op cit 9.

²⁰⁴ O. Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44(3) The International and Comparative Law Quarterly 501-520.

²⁰⁵ Brownlie op cit 82.

international custom is precisely what needs to be determined. Such contradiction can be solved by inferring that the requirement is that states behave in a way that reflects a subjective belief that this behaviour is required by rule that is law or is becoming law.²⁰⁶

3.3 Resolutions and recommendations of international organizations

Resolutions of the political organs of the United Nations play a role in the development of international custom. But this role is open to debate.²⁰⁷ Much of the controversy relates to the resolutions of the General Assembly of the United Nations. The General Assembly is empowered to carry out studies, pass resolutions, or issue recommendations on a host of matters regarding international law. But, while those studies, recommendations and resolutions are not binding in themselves, they have been used on more than one occasion as evidence of rules of customary international law. This happened in the *Western Sahara* case, where the International Court of Justice relied on resolutions of the General Assembly to determine the existence of basic legal principles regarding people's right of self-determination.²⁰⁸ This practice is encouraged by the General Assembly itself, which even recommended that its resolutions be considered by the International Court of Justice.²⁰⁹

The best way of determining the legal effect of resolutions and recommendations of international organizations, and not only those of the United Nations, is that they provide evidence of simultaneous and common attitudes of many states on a specific legal topic.²¹⁰ Indeed, international organizations may greatly assist in the development of rules of customary international law. For instance,

²⁰⁶ Brownlie op cit 82.

²⁰⁷ R.B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21(1) European Journal of International Law 173-204.

²⁰⁸ See *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, 12.

²⁰⁹ Preamble, U.N.G.A. Res. 3232 (XXIV), November 12, 1974.

²¹⁰ See Janis op cit 53.

the advisory opinion of the International Court of Justice in the *Reparations* case²¹¹ was based on resolutions by the United Nations.²¹²

3.4 Soft law

Resolutions of international organizations are sometimes regarded as a form of soft law. Soft law plays an important part in the development of customary international law. It refers to statements or declarations made in resolutions, declarations and other statements intended to serve as guidelines for states in certain areas of international and national affairs.²¹³ Perhaps, most examples of soft law are to be found in the area of international environmental law.²¹⁴ The 1992 Rio Declaration on Environment and Development is one notable instance of soft law in that area.

3.5 Concluding remarks

Overall, international customary law suffers from some shortcomings. First, state practice is so diverse that it is very hard to find evidence of constant and uniform practice.²¹⁵ To make matters worse, even if a jurist, a judge, a lawyer, or any other observer determines that there is constant and uniform practice, it is very unlikely that another jurist, judge, lawyer or observer will arrive at the same conclusion.²¹⁶ In other words, there is a remarkable level of indeterminacy of evidence of customary international law. Third, the process of adducing evidence of constant and uniform practice tends to exacerbate rather than reduce disagreements over international custom.²¹⁷ These disagreements arise especially when that evidence entrenches the parties in their rival camps.

²¹¹ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, 174.

²¹² G.A. Res. 258 (III), U.N. Doc. A/RES/258 (III) (3 December 1948).

²¹³ M. Olivier, 'The Relevance of 'Soft Law' as a Source of International Human Rights' (2002) 35(3) *The Comparative and International Law Journal of Southern Africa* 289–307.

²¹⁴ D. Bodansky, 'Customary (And Not so Customary) International Environmental Law' (1995) 3(1) *Indiana Journal of Global Legal Studies* 105–119.

²¹⁵ S. Talmon, 'Determining Customary International Law: The ICJ'S Methodology between Induction, Deduction and Assertion' (2015) 26.2 *European Journal of International Law* 417–443.

²¹⁶ Janis op cit 56–57.

²¹⁷ Janis op cit 57.

4. Principles of law from civilized nations

4.1 Historical context

The phrase ‘civilised nations’ is a colonial relic. It also reflects the racism and ideas of Western dominance that permeated international law in its earlier stages. Gozzi pays a closer look at the phrase and concluded that the expression ‘civilised nations’ designated a nation belonging to the community of nations adhering to the rule of international law as conceived in Western countries.²¹⁸ Thus, a nation’s inclusion in the community of civilised nations did no longer depend on its Christian values, but on its ability to protect life, liberty, and property of foreign people within its territory, that is, its ability to uphold a Western conception of the rule of law.²¹⁹

This Eurocentric division of the world between superior and inferior people, between civilised and non-civilised people justified the mandate system that eventually placed the people of South West Africa/Namibia under the tutelage of South Africa on behalf of the (civilised) British Crown. Again, as Gozzi put it:²²⁰

In the early 20th century, the colonial empires saw the need to justify their domination – the alleged superiority of the West... In fact, even after World War I, a distinction maintained through the mandate system, consisting in mandates that the colonial powers carried out on behalf of the community of nations...

Today, the conventional-wisdom understanding of the expression ‘civilised nations’ is that it refers to the general principles of law recognised by *the world’s major legal systems*.²²¹ Thus, the expression no longer carries strong political, ethnic, religious and cultural connotations. Nevertheless, the Court of Justice of the African Union replaced the phrase ‘civilized nations’ by “recognized universally or by African States”.²²²

²¹⁸ G. Gozzi, ‘History of International Law and Western Civilization’ (2007) 9 International Community Law Review 360-361.

²¹⁹ *ibid* 361.

²²⁰ *ibid* 367.

²²¹ Buergenthal *op cit* 5-6.

²²² Article 20(d) of the Protocol of the Court of Justice of the African Union, 2003.

4.2 Content

Principles of law from civilized nations are fall-back solutions to legal problems when treaties and custom do not provide solutions to those problems. International courts rarely use this source. The reason for this neglect is (1) the exponential growth of treaties covering a wide array of fields of international concern, and (2) the multiplication of institutions that administer those treaties and solve disputes based on the treaties.

When they have used it, international courts resorted to principles such as *res judicata* and trust. In determining the legal status of South West Africa/Namibia, the International Court of Justice has used the British notion of trust in the *Legal Status of South West Africa Case*.²²³ This is one major way in which Namibia has historically helped develop rules of international law.

One early interpretation of the *res judicata* principle in international law is the *Pious Fund* case.²²⁴ The Permanent Court of Arbitration tackled the question as to whether that principle prevented the adjudication of a previous arbitral sentence on a dispute between Mexico and the United States.²²⁵

Most often, international courts rely on principles of civilized nations by deploying the methods of comparative law. The basic idea is that a general principle of law will be so fundamental that it can be found in almost every legal system.²²⁶ McLachlan suggests that rules from specialised areas of international law, such as investment and tax law, could serve as ‘general principles of law common to civilised nations’.²²⁷

²²³ I.C.J. Reports 1950, 128.

²²⁴ *Mexico v U.S.*, Hague Court Report, J. Brown Scott, (ed) ‘Permanent Court of Arbitration 1902’ (Oxford University Press 1916). See also R. Theofanis, ‘The Doctrine of *Res Judicata* in International Criminal Law’ (2003) 3 International Criminal Law Review, 195 (mentioning the *Pious Fund* case as one of the earliest interpretation of the *res judicata* principle under public international law).

²²⁵ *Mexico v U.S.*, Hague Court Report, J. Brown Scott op cit.

²²⁶ Janis op cit 58.

²²⁷ C. McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 International and Comparative Law Quarterly 361.

4.3 References to the civilised world in Namibian court practice

Namibian courts have referred to the general principles of law recognised by other legal systems. They use the notion of the principles of law recognized by civilised nations in a progressive and liberal manner so as to include established practices in other parts of the world. It is clear that, in exploiting the notion of ‘civilised’ nations, Namibian courts do not exclusively focus on Western countries, for example, Canada, Germany, the United Kingdom, the United States or the European Union as legal system. In the ‘civilised’ group, Namibian courts also include countries such as Botswana, India, South Africa, and Zimbabwe.²²⁸

In *Corporal Punishment*, while relying on international law to interpret human dignity as protected by Article 8 of the Constitution, the Supreme Court referred to the notion of civilised nations on several occasions. It referred to the “emerging consensus of values in the civilised international community (of which Namibia is a part)”,²²⁹ to the “accelerating *consensus* against corporal punishment for adults throughout the civilised world”,²³⁰ to the provisions of Article 8(2) of the Constitution as articulating “a temper throughout the civilised world”,²³¹ to the imposition of corporal punishment on adults as “inconsistent with civilised values pertaining to the administration of justice and the punishment of offenders”,²³² and as “contrary to the traditional humanity practised by almost the whole of the civilised world”.²³³

Likewise, in *Kauesa*, the High Court took advantage of the general principles of law recognised by other jurisdictions during its interpretation of the freedom of speech and expression as provided for in Article 21(1) of the Constitution. It held that “[t]he principle that the freedom of speech cannot be used to incite crimes and offences is recognised by all civilised countries”.²³⁴ It further held that

²²⁸ See for example *the Corporal Punishment* case; and *Kauesa*.

²²⁹ *The Corporal Punishment* case at 188E.

²³⁰ *ibid* at 189F.

²³¹ *ibid* at 188F.

²³² *ibid* at 188H.

²³³ *The Corporal Punishment* case at 189A. See also *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* 1988 (2) SA 702 (ZS) at 722B-C.

²³⁴ *Kauesa* at 120G.

imposing “a reasonable limitation necessary in a democratic society”, including the law on contempt of court, is regarded as reasonable and necessary “in all civilised countries”.²³⁵ It took into account the “modern constitutions and/or criminal codes of so-called civilised countries” to safely conclude that the restriction on freedom of speech contained in the Racial Discrimination Prohibition Amendment Act 26 of 1991 as constitutional.²³⁶

5. Subsidiary sources

International courts and lawyers can use judicial precedents and doctrinal writings as *subsidiary* sources of international law. What ‘subsidiary’ means has long been a matter of some controversy. Hudson said that it is not clear whether ‘subsidiary’ implies that those sources are subordinated to others mentioned in Article 38 in the sense that they should be used only when international convention, custom and the general principles of law do not prove sufficient guidance.²³⁷ Today, the general consensus of opinion appears to follow Hudson’s interpretation, according to which subsidiary sources of law (i.e., judicial precedents and doctrinal writings) are not rules to be applied, but sources to be used for finding rules that are applicable.²³⁸

5.1 Judicial precedents

Just like principles of law from civilized nations, judicial precedents can be relied upon when treaties and custom do not have any available answers to a legal problem. The use of judicial precedents is subject to Article 9 of the Statute of the International Court of Justice. This means that the use of precedents or previous cases is limited to the matter and the parties directly involved in the case before the court. This caveat is to ensure that the system of

²³⁵ *ibid* at 120H-121A.

²³⁶ *ibid* at 150D-E.

²³⁷ M. Hudson, *The Permanent Court of International Justice 1920-1942* (Macmillan, 1943) 612.

²³⁸ M. Peil, ‘Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice’ (2012) 1 *Cambridge Journal of International and Comparative Law* 141.

precedents, which is a defining feature of common-law jurisdictions, does not apply to international courts, which adjudicate on matters emanating from both common-law jurisdictions and legal traditions other than the common law.

In practice, courts tend to follow their own (previous) decisions. In the many references I make to the decisions of the ICJ in this book, the court draws on its past decisions. Courts often stand by their past rulings in order to maintain judicial consistency.²³⁹ Further, in recent years, with the sharp increase in international courts and tribunals, precedents have come to play a prominent role in international law. And, though the quality of arbitral awards varies considerably, a number of outstanding (previous) decisions by arbitral tribunals have contributed to the development of international law.²⁴⁰ One example of those leading arbitral decisions is *Texaco v Libya*,²⁴¹ which dealt with nationalization of oil concessions and the internalization of contracts.

5.2 Writings by highly publicized jurists

Courts can also fall back on the writings of renowned legal scholars if treaties and custom are not helpful in resolving a dispute. Strictly speaking, doctrinal writings are not sources of international law. They do, however, serve as evidence of the law.²⁴² Courts and lawyers should be cautious in using the writings of jurists as they may contain various forms of prejudice and bias. As Judge Lachs said in *The Paquette Habana*, the doctrinal writings are resorted to, “not for the speculations of their authors concerning what the law ought to be but for their trustworthy evidence of the law really [is]”.²⁴³ Unfortunately, in practice, lawyers cited jurists indiscriminately, failing to distinguish between statements of the law as it is and statements of the law as it ought to be.²⁴⁴

Reliance on academic writings – and thus their importance – have decreased over the years. Though Brownlie is right to say that

²³⁹ Brownlie op cit 21

²⁴⁰ ibid 19.

²⁴¹ *Texaco Overseas Petroleum Co. and California Oil Co. v. Libya*, (1977) 53 I.L.R. 389; (1978) 17 I.L.M. 1.

²⁴² Brownlie op cit 24.

²⁴³ *The Paquette Habana*, 1899, 175 U.S. 677.

²⁴⁴ M. Peil op cit 143.

writings of jurists are still widely used by national courts,²⁴⁵ this statement that even international courts frequently use doctrinal writings must be qualified. Indeed, in a historical survey of more than 600 decisions by the International Court of Justice, Peil found that the Court has cited legal scholars in only 22 of 139 judgments and advisory opinions.²⁴⁶ Instead, the International Court of Justice prefer case law over academic writings.²⁴⁷

Falling under the heading of ‘doctrinal writings’, are sources analogous to the writings of highly publicised jurists. Though they are not expressly listed in Article 38(1) of the ICJ Statute, they may be subsumed under the rubric of “the most qualified publicists”. These analogous sources include the draft articles, the reports and memoranda by the International Law Commission; and reports and memoranda by other expert bodies.²⁴⁸

6. Peremptory norms

Peremptory norms (*ius cogens*) and obligations *erga omnes* do not follow the framework set by Article 38. Peremptory norms originate in the 1969 Vienna Convention on the Law of Treaties.²⁴⁹ Article 53 of the Vienna Convention stipulates that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The International Law Commission recognized peremptory norms and obligations *erga omnes* in the 2001 Articles on State

²⁴⁵ Brownlie op cit 24-25.

²⁴⁶ M. Peil op cit 143

²⁴⁷ *ibid* 144.

²⁴⁸ Brownlie op cit 25.

²⁴⁹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.

Responsibility.²⁵⁰ Article 48(1) of the Draft Articles refers to obligations *erga omnes* as follows:

Any state other than an injured State is entitled to invoke the responsibility of another State in accordance with [the paragraph on the cessation of internationally wrongful acts and the payment of reparation] if

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

Peremptory norms and obligations *erga omnes* had a transformative effect on international law.

There is a lot of uncertainty as to which rule qualifies as a peremptory norm. As a result, peremptory norms do not appear frequently in the practice of states. Linderfalk argues that *jus cogens* norms are in the nature of rules of customary international law, except that states may not avoid them by persistently objecting to those norms.²⁵¹ Confusion still surrounds the status of peremptory norms as standalone source of international law or a form of international custom.

Peremptory norms are today accepted by international and national courts. It was recognized in the 2006 *DRC v Rwanda* case.²⁵² In that case, the ICJ recognized the prevention of genocide and racial discrimination as peremptory norms.

Namibia greatly assisted in the development of international law through obligations *erga omnes*. Obligations *erga omnes* arose as a reaction to the *South West Africa* cases.²⁵³ The ICJ decision that

²⁵⁰ Responsibility of States for Internationally Wrongful Acts, 2001, Text reproduced as it appears in the

annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document

A/56/49(Vol. I)/Corr.4.

²⁵¹ U. Linderfalk, 'The Source of *Jus Cogens* Obligations – How Legal Positivism Copes with Peremptory International Law' (2013) 82 Nordic Journal of International Law, 388.

²⁵² I.C.J. Reports, 2006, 126.

²⁵³ *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase*, (ICJ), 1966, 6. (Hereinafter '*SWA cases (second phase)*')

Ethiopia and Liberia had no standing before that Court outraged states, especially in the developing world. The international community reacted by developing the notion of obligation *erga omnes*, which codified today in Article 48(1) of the Draft Articles on State Responsibility.²⁵⁴

7. Equity and considerations of humanity

Should lawyers and courts dealing with matters of international concern consider fairness? Article 38(1) (c) of the Statute of the International Court of Justice empowers international courts to decide a case *ex aequo et bono*. The term ‘*ex aequo et bono*’ is an ancient concept that holds that adjudicators should resolve disputes according to that which is “fair” and in “good conscience”.²⁵⁵ Evidently, equity or fairness is not a source of international law. However, in practice, courts and lawyers do occasionally rely on fairness as part of their legal or judicial reasoning. Equity was used by the International Court of Justice in the *North Sea Continental Shelf Case*²⁵⁶ in the delimitation of adjacent areas of continental shelf. And, in the *Burkina Faso-Mali case*²⁵⁷, the same court drew on equity to split a frontier pool. However, courts do not consider equity in the bulk of disputes.

Courts and lawyers may rely on humanity when reasoning through and deciding cases or matters involving international law. Considerations of humanity are likely to be subjective as they depend on the personal inclinations of a particular judge or lawyer. However, this realization does not mean that considerations of humanity cannot have an objective foundation. Indeed, numerous preambles to treaties, countless resolutions of international organizations, and official pronouncements by states, contain references to humanity. A well-known reference to humanity is found in the *Corfu Channel*²⁵⁸,

²⁵⁴ See J. A. Frowein and R. Wolfrum, ‘Max Planck Yearbook of United Nations’ in K. Zemanek (eds) *New trends in the Enforcement of erga omnes Obligations* (Kluwer Law International 2000) 1 – 52.

²⁵⁵ L. Trakman, ‘Ex Aequo et Bono: Demystifying an Ancient Concept’ (2008) 8 *Chicago Journal of International Law* 621.

²⁵⁶ *Germany v Denmark*, ICJ Reports, 1969, 3.

²⁵⁷ *Burkina Faso v Mali*, ICJ Reports, 1986

²⁵⁸ *United Kingdom v Albania*, ICJ Reports, 1949, 237.

where the Court referred to some general principles of law that included “elementary considerations of humanity, even more exacting in peace than in war.” In *Corporal Punishment*, the Supreme Court of Namibia considered the “traditional humanity practised by almost the whole of the civilised world” to hold that the infliction of corporal punishment on adults violates human dignity as protected in the Namibian Constitution.²⁵⁹

Mokgoro, who was then a Judge of the Constitutional Court of South Africa, explained in *Makwanyane* the intersection between the rights contained in the International Covenant on Civil and Political Rights and the pan-African philosophy of *Ubuntu*.²⁶⁰ *Ubuntu*, which translates as both ‘humanness’ and ‘humaneness’, is a philosophy common to all African nations.²⁶¹ While other courts on the African continent do not seem to have emulated Mokgoro’s approach, nothing prevents them or Namibia to do so in future cases.

²⁵⁹ *The Corporal Punishment case* at 189A.

²⁶⁰ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) at 308ff.

²⁶¹ *ibid* at 308ff (Mokgoro defined *Ubuntu* as “humaneness”).

INTERNATIONAL LAW IN THE NAMIBIAN LEGAL SYSTEM

International law sometimes feature in litigation before domestic courts.²⁶² In fact, international law, especially treaties, is mostly applied by domestic courts, not by international courts, tribunals or forums.²⁶³ Diaz maintains that international law is complied with because of their acceptance and application by an “epistemic community” of legal practitioners.²⁶⁴ Koh even argued that it is the process of interaction, interpretation, and internalization of international norms into domestic legal systems that explains why states “obey” international law, rather than simply conform to it when it suits them.²⁶⁵

In Namibia, the application of international law in domestic courts is reinforced by Article 144 of the Constitution, which makes international law a source of Namibian law, as I explained in the preceding chapter, that is, Chapter 4. Indeed, any discussion on the application of international law in Namibia should feature Article 144 of the Constitution. The question of the place of international law in municipal law often arises where the two conflict.

This section on the place of international law in Namibian law lies at the heart of the argument that international law plays a crucial role in the making of Namibia. Specifically, international law framed the democratic system and the constitutional order in Namibia

²⁶² D. Sloss and M. Van Alstine, *International Law in Domestic Courts* (2015). Available at: <http://digitalcommons.law.scu.edu/facpubs/889>. Accessed on 5 March 2017.

²⁶³ R. A. Falk, ‘The Role of Domestic Courts in the International Legal Order.’ (1964) 39.3.2. *Indiana Law Journal*. Available at: <http://www.repository.law.indiana.edu/ilj/vol39/iss3/2>. Accessed on 05 March 2017.

²⁶⁴ C.F. Diaz, ‘With Law in Their Minds: Some Reflection on the Nature of Public International Law at the Light of Current Political Science Theory’ (1998) 4 *ILSA Journal of International and Comparative Law* 1160.

²⁶⁵ H.H. Koh, ‘Why Do Nations Obey International Law?’ (1996-1997) 106 *Yale Law Journal* 2603.

through the ‘Constitutional Principles’ that forms the basic architecture of the Namibian Constitution and its liberal values. Nonetheless, as I show in this chapter, international law is under-utilised in Namibia by judges and legal practitioners alike. With less than 15 cases where Article 144 was expressly invoked, international law is actually the most neglected source of Namibian law.

1. International law in the Namibian constitutional dispensation

1.1 The drafting of the Constitution

International law influenced the Namibian Constitution in many respects. This influence can be seen in the drafting of the Constitution itself as well as in its philosophy. The drafting of the Namibian Constitution was framed by the Constitutional Principles enunciated in 1982 and included in a resolution of the Security Council of the United Nations.

The international community – through the good offices of the United Nations – planted the seeds that led to the Constitution of Namibia which came into force on the eve of Independence in March 1990. Viewed from that vantage point, the Constitution is a political compromise,²⁶⁶ though the process of adopting the Constitution was formally consensual.²⁶⁷

Two documents shaped the Namibian Constitution and the constitutional dispensation, namely the UN Security Council’s Resolution 435 and the 1982 Constitutional Principles. Resolution 435, adopted in 1978, paved the way for the transition to democracy and the organization of free and fair elections under the UN supervision.²⁶⁸ It laid the foundation for Namibia’s independence.

Drafting of what became known as the 1982 Constitutional Principles commenced in 1981. The Principles were drafted by the Western Contact Group (WCG), which consisted of Canada, France,

²⁶⁶ See N. Horn, The Forerunners of the Namibian Constitution in A Bösl et al. (eds.) *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (Macmillan Education Namibia 2010).

²⁶⁷ J. Diescho, *The Namibian Constitution in Perspective* (Gamsberg Macmillan Publishers) 30.

²⁶⁸ S/RES/435 (1978).

the United Kingdom (UK), the United States of America (US), and West Germany. In the context of the Cold War, the involvement of the WCG, which was called the ‘Group of Eminent Persons’, was to allay the fears of South Africa, White Namibians and internal political parties,²⁶⁹ and to ensure that Namibia would not be a communist country. The UN annexed the Constitutional Principles to its Resolution 435 in 1982. (‘Decisions’ by the Security Council in the form of resolutions bind all UN member states.²⁷⁰) By doing so, the UN granted the Principles officially an official and legal status and made them part of international law.²⁷¹

The Principles featured multilateral democracy, the Bill of Rights and an independent judiciary. Other principles include the protection of land (or property rights), which is repeated in Article 16 of the Namibian Constitution. This provision appears to have been important with regard to the ideological orientation of the Namibian Constitution as the protection of private property is one of the hallmarks of a liberal, free market economy as opposed to a planned economy under a communist state. In November 1989, Theo Ben-Gurirab recommended in and to the Constituent Assembly that the Principles be adopted as a framework for the writing of the future Namibian Constitution – a proposal the Assembly accepted unanimously.

The Constituent Assembly – the political body that unanimously adopted the text of the Namibian Constitution – did not fully negotiate and draft the Constitution. The actual drafting of the Constitution was done by three South African lawyers: Arthur Chaskalson, Marinus Wiechers, and Gerhard Erasmus.²⁷² These

²⁶⁹ See N. Horn op cit 26-27.

²⁷⁰ See Chapter 4 (sources of international law).

²⁷¹ See M. Wiechers, ‘Namibia: The 1982 Constitutional Principles and Their Legal Significance’ (1989/1990) 15 South African Yearbook of International Law 1ff.

²⁷² J. Diescho, *The Namibian Constitution in Perspective* (Gamsberg Macmillan Publishers) 31-35. Chaskalson, who would later become the Chief Justice of South Africa, was then the Chairman of the Johannesburg Bar Council; Wiechers was professor of constitutional law at the University of South Africa; and Erasmus was professor of public law at Stellenbosch University. See also the minutes of the debates in the Constituent Assembly: Namibia, Constituent Assembly, ‘Debates’ (21 November 1989 - 31 January 1990) 1; and Namibia, Constituent Assembly, ‘Debates’ (1 February 1990 – 16 March 1990) 2.

South African lawyers, however, wrote the Constitution on the basis of the draft of the Constitution proposed by SWAPO, and not those submitted by the Democratic Turnhalle Alliance (DTA) and the Aksie Christelik Nasionaal (ACN), nor was it based on the principles put forth by the United Democratic Front of Namibia (UDF).²⁷³

In the end, the United Nations checked the successive drafts of the Namibian Constitution to see if they complied with the 1982 Constitutional Principles. As Diescho put it:²⁷⁴

The Assembly that day endorsed [the 1982 Constitutional Principles] as the basis of their work... Thereafter, as successive drafts of the Constitution appeared, these were examined by the United Nations, and to the extent that these were considered as insufficiently reflecting one Principle or another, this was, generally informally, brought to the attention of competent members of the Assembly... As a result, by the time the text that was adopted was achieved, the Secretary-General was able to report to the Security Council, first orally and informally and later supported by an analytical study, that the Principles had been fully respected in the Constitution.

The special significance of the 1982 Constitutional Principles, which were initially rejected by SWAPO given the engagement of the WCG, is that it forms the architecture of the Namibian Constitution and the country's constitutional order. The Constitutional Principles, by virtue of its incorporation in Resolution 435, were an integral part of the transitional process.²⁷⁵ Since the 1982 Constitutional Principles are part of international law, the key international law question is what would happen if the Constitution is amended or replaced in such a way that the Principles are no longer reflected in the amended or new constitution?

1.2 The philosophy of the Constitution

One of the most salient features of the Namibian Constitution is its Bill of Rights in Chapter 3. The Bill of Rights in the Namibian Constitution – and those in other constitutions – owe a great deal to the natural law school of jurisprudence, who have also tremendously

²⁷³ Diescho op cit 33-34.

²⁷⁴ *ibid* 42.

²⁷⁵ *ibid* 26-27.

given to the development of universal principles of human rights. Natural law jurists have also developed and enriched the monism that characterizes countries such as Namibia, as I explain below.

Although the Namibian Constitution assimilated notions, principles and legal traditions from constitutional experiences in the US, the UK, the Netherlands, and the Roman Empire, these legacies belong mostly to comparative law than to international law. These legacies stem from Namibia's Roman-Dutch heritage. The Namibian Constitution structures the parts played by these transplants from foreign jurisdictions, but these transplants do not squarely fit in a discussion on the legal principles and rules received from international law.

1.3 Friendly clauses

The Namibian Constitution can be described as international law-friendly. A number of clauses of the Constitution relate positively to international law. I dwell on those individual provisions in the relevant chapters. For the time being, I first cite the provisions without discussing them (except for Article 11) to acquaint you with them. Those provisions are:

1. Article 144 (I elaborate on this article later in this chapter);²⁷⁶

2. The Preamble:

Whereas we the people of Namibia – desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world; ...²⁷⁷

3. Article 1(4)(I discuss this article in Chapter 10):

The national territory of Namibia shall consist of whole of the territory recognized by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.²⁷⁸

²⁷⁶ Constitution of the Republic of Namibia, 64-65.

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*

4. The Bill of Rights in Chapter 3. The Bill of Rights is evidently based on the Universal Declaration of Human Rights, adopted on December 10th, 1948, by the General Assembly of the United Nations (I discuss the Bill of Rights in Chapter 16);

5. Article 95(d)(this provision features Chapter 17):

The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO;²⁷⁹

6. Article 66(1) indirectly deals with international law as it accepts, under certain conditions, the validity of the common law (including common-law rules pertaining to international law) alongside customary laws (I comment on Article 66(1) later in this chapter):

Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

7. Article 96 (I cover this provision in Chapter 7, Chapter 12, and Chapter 14):

The State shall endeavour to ensure that in its international relations it:

- (a) adopts and maintains a policy of non-alignment
- (b) promotes international co-operation, peace and security;
- (c) creates and maintains just and mutually beneficial relations among nations;
- (d) fosters respect for international law and treaty obligations;
- (e) encourages the settlement of international disputes by peaceful means.”²⁸⁰

²⁷⁹ *ibid.*

²⁸⁰ *ibid.*

8. Article 99 (I briefly reflect on this provision in Chapter 17):

Foreign investment shall be encouraged within Namibia subject to provisions of an Investment Code to be adopted by Parliament.²⁸¹

9. Article 140(1):

Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

10. And Article 143 (I briefly tackle both Articles 140(1) and 143 at the end of Chapter 7 where I canvass state succession to international treaties):

All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2) (d) hereof otherwise decides.

The positive attitude towards international law is in large part due to the country's long and painful experience of colonial and apartheid rule.

Tshosa²⁸² argues that providing for the application of international law in the Constitution is just one step in the process of translating international law in domestic law. He further argues that the judiciary plays an important role in the application of international normative standards in national law and in their domestication.

2. The theoretical questions

The relationship between international law and national law is informed by two theories: monism and dualism. (Monism is the older

²⁸¹ *ibid.*

²⁸² O. Tshosa, 'The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy' (2010) *Namibia Law Journal* 3.

of the two.)²⁸³ These two theories both assume that international law and municipal law have a common field of operation and that the real issue is which one of the two should be the master.²⁸⁴ The question of the relationship between international law and municipal law comes to the fore most vividly when there is a conflict or tension between a state's obligations under municipal law and that state's obligations under international law.

2.1 Monism

Monism views international law and national law as being part of the same universal system.²⁸⁵ Monists such as Kelsen, Vendross and Scelle argue that “international and municipal law, far from being essentially different, must be regarded as manifestations of a single conception of law.”²⁸⁶ Monists are of the opinion that international law may be directly applied, without the need for any act of adoption by the courts.²⁸⁷ They argue that, in cases of conflict, international law should prevail over national law. They insist that international law is not foreign law, though later on they had to accept that the whole body of international law binding on a state cannot be directly applied by municipal courts.²⁸⁸ Hugo Grotius, Hans Kelsen, Hersch Lauterpacht are some of the most famous monists.

Monists fall in two groups: One group, which includes Lauterpacht, advocates the unity of international law and municipal law on strong ethical and moral grounds and a profound concern for human rights; the other group, which includes Kelsen, affirms that unity for purely logical reasons. Most monists belong to the natural law school of thought or jurisprudence.

Lauterpacht is a major proponent of the naturalist strand of monism. He believed that international law should be concerned with the welfare of individuals and, accordingly, saw international law a

²⁸³ J. O'Brien, *International Law* (2nd edn, Cavendish Publishing Limited 2002) 108.

²⁸⁴ I. Brownlie, *Principles of Public International Law* (6th ed. Oxford) 31.

²⁸⁵ O'Brien op cit 108.

²⁸⁶ 'International law and municipal law' in E Lauterpacht (ed) *I International Law: Being the Collected Papers of Hersch Lauterpacht* (The General Works 1970) 216 at 217 in J. Dugard, *International Law* (4th edn, Juta and Company (Pty) Ltd 2011) 42.

²⁸⁷ Dugard op cit 42.

²⁸⁸ Ibid.

means to that end.²⁸⁹ He was particularly sceptical of the international system; he had faith in the ability of rules of international law to constrain that system with a concern for justice, human rights, and the wellbeing of individuals.²⁹⁰

By contrast, Kelsen espoused a formal and logical approach to monism. He used Kant's philosophy as the basis of his reasoning. He posited that international law lays down rules and standards for states and that municipal law has more or less similar rules and standards.²⁹¹ When those rules and standards were similar or identical, a logical unity was forged.²⁹² He argued that, since states derive rules for their relations with other states from international law, international law is superior than municipal law, as far as those rules are concerned.²⁹³

2.2 Dualism

Subsequently, owing to the fact that dualists view international law and municipal law as separate legal systems, "international law may be applied by domestic courts only if 'adopted' by courts, or transformed in local law by legislation."²⁹⁴

Dualism – or the doctrine of transformation – views international law and national law as two distinct and independent legal orders. (Dualists are also known as pluralists.) Dualists make a number of arguments:

1. The two legal systems govern two different relations: national law regulates relations between individuals whereas international law regulates relations between states.

2. Because the dualists view international and municipal law as separate legal systems, international law may be applied by domestic

²⁸⁹ M.N. Shaw, *International Law* (7th edn, Cambridge University Press) 122.

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ *ibid.* 122 – 123.

²⁹⁴ For a discussion of the adoption and transformation theories, see F. Morgenstern 'Judicial Practice and the Supremacy of International Law' (1950) 27 *British Yearbook of International Law* 42; J. Dugard, *International Law* (4th edn, Juta 2011) 42.

courts only if ‘adopted’ by courts, or transformed in local law by legislation.²⁹⁵

3. Triepel argues that the two systems have different juridical origins. The source of national law is the will of the state itself whereas the source of international law is the common will of states.

4. The two systems are conditioned by different fundamental principles: Municipal law by the principle that legislation must be obeyed whereas international law by *pacta sunt servanda*.

5. Anzilotti argues that the two systems are so different that no conflict is possible and that, in case of conflict, national law must prevail.

6. The prevalence of national law over international law is based on state sovereignty.

7. For dualists, even where a municipal law permits the application of international law, this application results from the state’s sovereignty rather than the influence of international law within municipal law.²⁹⁶

Dualist views are propounded mostly by positivists,²⁹⁷ who see international law as founded upon the consent of states. Hegel, Anzilotti and Triepel are some of the most famous dualists. Given their theoretical grounding in positive law, dualists’ views tend to assume the supremacy of the states in international law.

2.3 Coordination

These theories must be approached with caution because in practice they may not purely determine the relationship between national law and international law. This is the claim made in ‘theories of coordination’.²⁹⁸ Another reason for caution is the approach of national courts towards that relationship. For instance, even in monist countries, courts sometimes fail to apply treaties that are binding on the country in which they serve. In *Clover*,²⁹⁹ the High

²⁹⁵ *ibid.*

²⁹⁶ Shaw *op cit* 122.

²⁹⁷ O’Brien *op cit* 108.

²⁹⁸ I. Wuerth. ‘International Law in Domestic Courts and the Jurisdictional Immunities of the State Case’ 13 Melbourne Journal of International Law 2.

²⁹⁹ *Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 386/2013)* [2014] NAHCMD 245 (15 August 2014).

Court of Namibia relied on common law principles of administrative law instead of invoking the 2002 Southern African Customs Union (SACU) Agreement, which was binding on Namibia by virtue of Article 144 of the Namibian Constitution.

An increasing number of jurists submit that scholars should move away from the monism-dualism dichotomy because the legal consequences of those theories are at odds with state practice at both national and international levels.³⁰⁰ Thus, Fitzmaurice denies the assumption that international law and municipal law have a common field of operation.³⁰¹ International law and municipal law do not conflict because they operate in different spheres, and each is supreme in its own sphere.³⁰² What is conflicting is the *obligations* of states, that is, the difficulty of a state in its domestic affairs to act in conformity with its obligations under international law.³⁰³ The consequence of this tension is not the invalidity of domestic law but the responsibility of the state under international law.³⁰⁴

3. Article 144 of the Namibian Constitution

So where does Namibia stand? Is Namibia monist or dualist/pluralist? As I demonstrate through the analysis of the wording of Article 144 of the Constitution, Namibia is largely monist; and, in this sense, Namibia is markedly different from South Africa, which is evidently dualist. However, I also show that, though Namibia is predominantly monist, it contains elements of dualism. This is as far as the legal or constitutional position is concerned in Namibia. In practice, as Dausab laments, the law-makers tend to adopt – contrary to the letter of Article 144 – a dualist approach to the integration of international law in Namibian law.³⁰⁵ They require

³⁰⁰ I. Brownlie, *Principles of Public International Law* (6th ed. Oxford) 33.

³⁰¹ *ibid* 33 – 34.

³⁰² Brownlie *op cit* 33.

³⁰³ *ibid*.

³⁰⁴ *ibid*.

³⁰⁵ Y. Dausab, 'International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective' in A Bösl *et al.* (eds.) *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades* (Macmillan Education Namibia 2010).

enabling legislation though this legislation is not required by Article 144.

3.1 General observations

Article 144 of the Namibian Constitution is arguably the most important provision from an international law perspective. Article 144 reads:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.³⁰⁶

Article 144 confirms position in the Roman-Dutch common law that the general rules of public international law binding upon Namibia have always been part of national law.³⁰⁷

One of the major implication of Article 144 is that *international law is one of the sources of Namibian law*. Courts are obliged to use Article 144 as a source of Namibian law. This position makes Namibia different from South Africa, where international treaties becomes part of municipal law only after legislative incorporation of those treaties into law. Thus, in South Africa, international law, as such, is not a source of international law and the parliament can only introduce an international treaty into municipal law through legislation, making legislation and not international law the relevant source of international law.

Thosa affirms that another effect of Article 144 is to accord both the general rules of international law and international agreements ‘direct and automatic application’.³⁰⁸ That is, international law applies in Namibia immediately upon ratification without the need for lawmakers to enact enabling legislation. In *Mwilima*, O’Linn AJA called Article 144 “a special mechanism” that introduces

³⁰⁶ Constitution of the Republic of Namibia.

³⁰⁷ *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA at 949.

³⁰⁸ Tshosa op cit 11.

international treaties (in that case, the International Covenant on Civil and Political Rights) into the law of Namibia.³⁰⁹

However, there are two exceptions: the Constitution and Acts of Parliament. How can this be reconciled with the provision in the Vienna Convention on the Law of Treaties that a state party to a treaty may not invoke its internal law to avoid its treaty obligations?³¹⁰

This clause subjects the application of international law to the Constitution and Acts of Parliament. This position differs from countries that provide that international law, especially international custom, prevails over domestic rules in cases where the two conflict. For instance, the Constitution of Germany provides in article 25 that “the general rules of the law of nations are part of federal law” and that those general rules “take precedence against domestic law and directly create rights and duties for persons in the country.”

Nonetheless, the view that, by virtue of Article 144, international treaties apply in Namibia directly and automatically does not fit the domestic jurisprudence on international law. In cases such as *Carracelas (1)*³¹¹ and *South African Poultry Association*,³¹² to mention but a few, lawyers and judges alike have maintained that international treaties do not apply in Namibia directly and automatically. It flows from the foregoing that the *Namibian courts have not yet authoritatively settled the issue as to whether ratified treaties apply directly and automatically.*

Importantly, Article 144 elevates international law to *constitutional status*. This status results from the choice of the Constituent Assembly to incorporate Article 144 in the Constitution rather than place it in an Act of Parliament. For the same reason, Article 66(1) reinforces the constitutional status of international law in Namibian law. Article 66(1) stipulates that the common law in force at the time of Independence – including the presumption in the interpretation of statutes that the legislator does not intend to violate international law – remains valid to the extent that it does not conflict with the Namibian Constitution. A fourth effect of article 144 is that it obliges courts to take *judicial notice of international law*. This is because judges in

³⁰⁹ *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC) 269.

³¹⁰ Article 46(1) of the Vienna Convention on the Law of Treaties, 1969.

³¹¹ *S v Carracelas and Others (1)* 1992 NR 322 (HC) 327.

³¹²

Namibia swear, upon taking office, to apply the provisions of the Constitution,³¹³ including Article 144.

In light of the preceding, is Namibia a monist or dualist country? Has the Namibian Constitution adopted a monist or dualist approach to the relationship between international law and national law? In conclusion, Namibia has adopted a monist approach to the relationship between Namibian law and international law, although the Namibian legal system contains some elements of dualism. This is evidenced by the direct and automatic application of international law in the Namibian legal system. As to the elements of dualism, they will emerge from the discussion of Article 144 in the next section.

3.2 Critical analysis of Article 144

3.2.1 “General rules of public international law”

Does this phrase refer to customary international law? The term ‘general’ refers to rules widely supported and accepted by the vast majority of states.³¹⁴ It should thus refer to customary international law.³¹⁵

Here, distinguishing between customary international law and international treaties determines whether international law forms part of Namibian law. Before Independence in 1990, the courts in *Nduli*³¹⁶ and *Binga*³¹⁷ treated customary international law as part of the law of South West Africa (Namibia), meaning that customary international law applied in Namibia directly and automatically. In contrast to customary international law, the status of international agreements or treaties in the Namibian legal system is less certain, as I explain below.

Another question: Assuming that the phrase “general rules of public international law” refers to customary international law, does it exclude regional or particular rules of customary international law? Thosa argues that, in line with the positive attitude of the Namibian Constitution towards international law, Article 144 includes in that

³¹³ See Schedule 1 of the Constitution of the Republic of Namibia, 1990.

³¹⁴ Tshosa op cit 12.

³¹⁵ *ibid.*

³¹⁶ *Nduli and Another v Minister of Justice and Another* 1978 (1) SA 893 906.

³¹⁷ *Binga v Administrator-General, South West Africa and Others* 1984 (3) SA 949 (SWA) 968-969.

phrase regional or particular rules of customary international law, based on constant and uniform state practice.³¹⁸

3.2.2 “*International agreements*”

This phrase appears to confer on all international treaties binding upon Namibia automatic and direct application in Namibian law. It should mean that both natural and juristic persons can directly invoke these treaties in the courts and elsewhere in Namibia without being translated by a domesticating or incorporating law.

However, in *South African Poultry Association*, a Namibian case dealing with infant industry protection in terms of the 2002 Southern African Customs Union (SACU) Agreement, the lawyers representing the government denied that international treaties apply in Namibia automatically.³¹⁹ As observed by Tshosa, no cases have so far critically analyzed Article 144 insofar as it makes treaties self-operative, self-executing in Namibian law in order to define its scope and parameters.³²⁰ Whereas they have clearly included customary international law in the law of Namibia, courts still divide on the question whether ratified treaties also belong to Namibian law as well. Anyway, though it did not decide the merits of the case, the Supreme Court remitted the matter to the High Court for it to address them. Hopefully, the High Court will shed light on the content and scope of Article 144.

3.2.3 “*Binding upon Namibia*”

General rules of public international law that do not bind Namibia do not form part of Namibian law. The question then arises as to how one determines whether a given rule of public international law binds Namibia. Thosa submits that such determination must meet the criteria set by international law itself. For instance, a rule of customary international law will not bind Namibia if there is evidence that Namibia has opted out of the rule during its formation due to its persistent objection.

³¹⁸ Tshosa op cit 14.

³¹⁹ *South African Poultry Association and Others v Minister of Trade and Industry and Others* (SA 37/2016)[2018] NASC (17 January 2018) [37]-[38] and [41].

³²⁰ Tshosa op cit 23.

4. Municipal law before international forums

In the *Brazilian Loans Case*, the Permanent Court of International Justice held that an international court or tribunal is

not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied.³²¹

Issues involving municipal law arise before international courts and forums in certain types of cases:³²²

1. Cases in which a tribunal addressing issues of international law has to scrutinize the municipal law of one or more states. The *Campbell* case, on land reform in Zimbabwe, entailed the analysis of constitutional provisions in Zimbabwe.

2. Treaties that directly refer to rules of internal law or that use concepts that can only be properly understood in the context of internal law. ‘Compulsory acquisition’ (i.e., expropriation) in the *Campbell* case is one such concept.

3. Treaties providing for the rights of minority groups or resident aliens may refer to municipal law to determine the status of those people.

4. Every so often an international tribunal may have little choice other than to rely on rules of internal law to determine issues.

Municipal law may also serve as evidence of a given state’s conduct before an international court or tribunal for the purposes of attributing responsibility to that state. International courts have taken the proposition of ‘municipal law as evidence’ to mean at least six things³²³:

1. Municipal law may serve as evidence of a state’s conduct that violates international law.

³²¹ *Brazilian Loans Case (France v. Brazil)*, P.C.I.J. Reports, Series A, No. 21, 124-125.

³²² Brownlie op cit 37-38.

³²³ ibid 39 - 41.

2. Judicial notice does not apply to municipal law such that litigants will have to prove the relevant provisions of municipal law in litigation before an international court.

3. When a state has interpreted its municipal law, that interpretation is binding on international courts and tribunals. Thus, the Supreme Court of Namibia's interpretation that 'sex' in Article 10 of the Constitution excludes 'sexual orientation' is binding on international courts.

4. The *dicta* of international tribunals assume that, for all issues of domestic law, there is a rule of municipal law that addresses it and that the rule in question could be ascertained as any other facts in the case at hand.

5. An international court or tribunal may not declare the internal validity of a rule of domestic law as it must respect the domestic jurisdiction of states.

6. International tribunals cannot interpret municipal law. This proposition derives from the proposition that municipal law serves as evidence of a state's conduct.

5. International and national application of international law

International law is applied both at the national and international levels. This distinction is important because, even if the rules of international law are the same everywhere, the application of international law on the international plane is different from its application in municipal law.

On the international sphere, international law is applied by states and international organizations every day. With a few exceptions, international law is the only legal system that applies to international organizations and to states, in their relations with other states.³²⁴ At the international level, the rights and obligations of states are supreme: They prevail over any other right or obligations that states have under domestic law.

On the national plane, international law is not a legal system, as it is when applied by states and international organizations on the international plane. When lawyers submit that international law is

³²⁴ T. Buergenthal and S.D. Murphy op cit 3.

part of national law, what they mean is that it is part of national law in very much the same way as the administrative law, the law of contract, insurance law, etc., is a branch of national law. Unlike the application of international law at the international level, the rights and obligations of states recognized under municipal law may – in most states – supersede the rights and obligations of states recognized under international law when a matter is before a domestic court, an administrative agency or other state organ.

Like I observed in this chapter's opening lines, international law is mostly apply by domestic courts, as opposed to international courts. This realization reveals that international law largely pivots on domestic courts obeying it. Accordingly, having discussed where international law stands within Namibia's legal system, in the next chapter I consider how domestic courts handle international law in that system.

HOW NAMIBIAN COURTS APPLY INTERNATIONAL LAW

If international law were a song, Namibia would sound like an amateur pianist. Though in a number of instances Namibian courts hit the right notes, in many other instances they struck the wrong ones. This mixed record does not spring from an unwillingness on the part of judges to play dissonant notes. Quite the contrary.

In this chapter, after presenting the main issue regarding the application of international law by Namibia courts, I first discuss the cases where the courts sang in tune with international law before I move on to explain the cases where the courts got it wrong. And, in the concluding section, I use the *Likany* case to illustrate big-picture issues confronted by judges and lawyers in Namibia when applying international law.

1. The main issue

As I showed in the preceding chapter, the relationship between international law and municipal law mostly arises when a rule of international law contradicts a rule of municipal law. As a general principle, a state cannot justify a violation of its obligations under international law by invoking a rule of its internal or municipal law. This general principle is provided for in Article 27 of the 1969 Vienna Convention on the Law of Treaties.³²⁵ State practice and judicial precedents have strengthened this principle. In *Greco-Bulgarian Communities*, the Permanent Court of International Justice held:³²⁶

It is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

³²⁵ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331; (1969) 8 I.L.M. 679.

³²⁶ 1930 P.C.I.J. Reports, ser. B, no. 17, at 32.

Likewise, a state cannot rely on the provisions of its constitution to evade its international law obligations.³²⁷

Flowing from the nature of treaty obligations and international customary law, states have a duty to conform their internal law to their obligations under international law.³²⁸ A state does not violate international law by the mere fact that *generally* it did not bring its internal law in line with international law; it violates international law when it relies on specific rules of its internal law to avoid its international law in a *specific instance*.³²⁹

If international law allowed states to evade their obligations merely on the basis of contrary provisions in municipal law, obligations arising from international law could be easily avoided by dint of domestic legislation.³³⁰

Neither can a state invoke a violation of a rule of its domestic law to justify why it evaded its international law obligations.³³¹ However, a state may invoke a rule of its internal law to stop an international treaty and the obligations it creates from applying if delegates of that state ratified that treaty in violation of a rule of international law of fundamental importance.³³²

With regard to the application of international treaties in municipal law, no universal approach to that relationship exists, and different countries approach that relationship differently. While most common law countries do not let international treaties self-execute, that is, applicable without any legislative incorporation, Namibia stands as a unique case as international treaties duly ratified by Namibia apply automatically by virtue of Article 144 of the Constitution. France and a number of French-speaking countries in Africa permit the self-execution of ratified treaties in explicit constitutional provisions. The law in the United States (US) also provides for some treaties to self-execute.³³³

³²⁷ *Polish Nationals in Danzig* (1931), P.C.I.J. Reports, ser. A/B, no. 44, at 24.

³²⁸ I. Brownlie, *Principles of Public International Law* (6th ed. Oxford) 35.

³²⁹ *ibid.*

³³⁰ M.N. Shaw, *International Law* (7th edn, Cambridge University Press) 124.

³³¹ Article 46(1) of the Vienna Convention on the Law of Treaties, 1969.

³³² Article 46(2) of the Vienna Convention on the Law of Treaties, 1969.

³³³ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen Publishers 2003) 103.

The self-execution of treaties exacerbates the risk of conflict between international law and municipal law. In some countries, constitutional provisions leave the task of harmonizing the international law (both treaties and custom) and municipal law to the national parliament.³³⁴ In Namibia and most countries that allow some treaties to self-execute, no such provision exists. The resolution of these conflicts will be left to courts.

As for the application of customary international law in domestic courts, the position in Namibia resembles that of many Francophone countries, namely the Constitution expressly provides for its application in domestic law. In the Namibian case, the relevant provision is Article 144 of the Constitution.

2. Human rights and Article 144

Namibian courts have applied rules of international law and relied on Article 144 of the Constitution in relatively long line of cases,³³⁵ the majority of which involves human rights issues. In this section, I only discuss a number of important cases.

³³⁴ *ibid* 112.

³³⁵ The cases not discussed in this section but that form part of the jurisprudence of Article 144 include *Government of the Republic of Namibia & Others v Mwilima & Others* 2002 NR 235 (SC); *S v Mushwena & Others* 2004 NR 35 (HC), 2004 NR 276 (SC); *S v Munuma* (CC 03/2004) [2014] NAHCMD 363 (27 November 2014)(Caprivi high treason suspects unsuccessfully claimed that they were abducted from Botswana in violation of international law – a claim that the court rejected); *S v Malumo* (CC 32-2001) [2015] NAHCMD 213 (7-14 September 2015)(in another case involving the Caprivi high treason suspects, the Court had to resort to international law to determine the territorial boundaries of Namibia); *Likanyi and Others v State*, Supreme Court of Namibia, Case No. SCR 2/2016 (alleged abduction in violation of international law); *Waterberg Big Game Hunting Lodge Otjabewita (Pty) Ltd v Minister of Environment Tourism*, 2005 NASC 9 (23 November 2005) The Applicant was denied an application to have Mountain Reedbuck imported from South Africa. The application was denied by Mr. Beytell and the Ministry of Environment (Respondent). Namibia is a signatory to the Convention on Biological Diversity. Which was signed at the United Nations “Earth Summit”, which is part of Namibian law by virtue of article 144. Appeal is successful; *Alexander v Minister of Justice & Others*, SA 32/2008, 2010 NASC 2 (9 April 2010) para. 83-6 (ICCPR cited to support court’s view of substantive guarantee of liberty in Constitution) The applicant was to be extradited because he had committed extradition offences in America and was to be extradited under s11 of the Extradition Act. The ICCPR had been ratified by Namibia, by virtue making it part of Namibian law under article 144 of the Constitution. Subsequently giving

2.1 Ex parte Attorney General: In re Corporal Punishment by Organs of State (SC 1991)

This is one of the first cases involving Article 144. The Supreme Court of Namibia confronted the question as to whether corporal punishment by or on behalf of state organs violates human dignity, as protected by Article 8 of the Constitution.³³⁶ The court held that corporal punishment by judicial or quasi-judicial authority or directing corporal punishment on any person constitutes inhuman or degrading punishment, thereby violating human dignity.³³⁷

In the process of interpreting the Namibian Constitution, the Supreme Court relied on international human rights norms embodied in international treaties, but it did not expressly refer to Article 144. This fact raises an interesting question, to wit: Can international law be used without referring to Article 144? Maybe, the

it effect in Namibian law. The court looked at provisions that specifically applied to liberty and the protection of it. The court also looked at article 5 of the European Convention on Human Rights; *Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107 (SC) The applicant applied for Permanent Residency in Namibia. The applicant worked and lived in Namibia. The applicant was denied, it was believed that her application was denied on the basis of her sexual orientation. The Supreme Court argued that it was important to consider International Law. The court used the following when decided upon the matter. The Universal Declaration of Human Rights, The African Charter on Human & Peoples' Rights and the International Covenant on Civil and Political Rights. The court used the abovementioned conventions to determine the right to privacy, right to family equality and the right to dignity of the applicant. The refusal of the permanent residency was set aside and referred back to the board.; *Attorney-General v Hamvaama & Others*, A 176/2007, 2008 NAHC 80 (31 July 2008) (The relevant jurisprudence of the Human Rights Committee was not evaluated when the court examined whether Namibia's Criminal Procedure Act of 1977 violates Article 14 of ICCPR). The applicants sought to declare certain provisions under the Criminal Procedure Act unconstitutional. It was argued that these sections were in contradiction to article 14(5) of the International Covenant on Civil and Political Rights (ICCPR). Namibia is a state party to the Covenant. It was argued that a fair trial was not being given to the applicants under article 12 of the Namibian constitution. The court held that article 14 of the ICCPR was groundless and could not succeed. The absence of oral submissions to the Chief Justice did not infringe upon the principle of a fair hearing under the ICCPR. It was also further held by the court that, chamber consideration of a petition by 3 judges does not infringe the requirement of a public hearing requirement. The court held that the procedure need only be deemed fair.

³³⁶ *Ex parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC) (hereinafter the 'Corporal Punishment case').

³³⁷ *the Corporal Punishment case*.

court omitted to explicitly mention Article 144 simply because, with the Constitution entering into force the same year as that judgment, judges had yet to familiarize themselves with all the provisions of the Constitution, including Article 144.

Moreover, in that specific case, did the court use international law as a source of Namibian law or as a source of meaning to interpret the Constitution? Similarly, the Supreme Court did not expressly state that the prohibition on corporation punishment had matured into customary international law, which forms part of Namibian law.

2.2 Cultura 2000 v. Government of the Republic of Namibia (HC 1992)

An association, called ‘Administration for Whites’ and established for the cultural activities of the ‘Whites’, granted in 1989 the respondents (i.e., Cultura 2000) loans and valuable assets worth millions of Namibian dollars.³³⁸ The appellant (i.e., the Republic of Namibia) passed legislation to repudiate those loans and divest them to the Namibian state. Cultura 2000 applied to the High Court for an order against the appellant declaring the State Repudiation (Cultura 2000) Act as unconstitutional. The court held that the State Repudiation Act was unconstitutional because it violated Cultura 2000’s rights to culture.³³⁹

In making such an interpretation, the Court relied on Article 144:

Article 144 of the Constitution sought to give expression to the intention of the Constitution to make Namibia part of the international community.

Even though the Supreme Court reversed the part of the High Court decision that declared the State Repudiation Act as

³³⁸ The assets and the loan consisted of at least 8 million Rands. (By law, the Namibian dollar has a one-to-one peg to the South African Rand) More specifically, the ‘Administration for Whites’ donated Cultura 2000 an amount of 4 million Rands. It also granted it a loan amounting to 4 million Rands and, after the black majority party SWAPO won the general election and three weeks before Namibia gained formal independence, it converted the loan into an outright donation.

³³⁹ *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1992 NR 110 (HC).

unconstitutional,³⁴⁰ the High Court decision in *Cultura 2000* nonetheless confirms that international human rights norms and values form part of Namibian law.

2.3 Kauesa v. Minister of Home Affairs (HC 1994)

The High Court held that the provisions of the African Charter on Human and Peoples' Rights bind Namibia by virtue of Articles 144 and 143 of the Constitution, which recognize the African Charter as binding in Namibian law. The same applies to the Universal Declaration of Human Rights. Its provisions should carry weight when interpreting the Constitution.

2.4 S v. Mushwena (SC 2004)

This case involved the arrest, abduction and deportation of 13 accused persons from Botswana and Zambia by security and immigration officials from both countries to Namibia, where they faced charges of, among others, treason and murder allegedly committed in Namibia. The Supreme Court viewed the International Covenant on Civil and Political Rights, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol as all belonging to Namibian law by virtue of Article 144. The Court also held that some of the basic principles contained in those treaties have been incorporated into Namibian laws.

3. When the courts hit the wrong notes

On more than one occasion, Namibian courts got international law wrong. Many of the earlier cases dealing with international law and Article 144 of the Constitution came from the field of maritime law, which I address in Chapter 18. Those cases (see, for example, *Curras* and *Martinez*, below) often involved illegal and predatory fishing from vessels or ships piloted by Spanish nationals.

I do not discard the possibility that those false starts in applying international law in Namibia find their roots in the judges' relative lack of familiarity with Article 144 of the Constitution. This hypothesis would explain why those earlier cases (see, for example,

³⁴⁰ *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1993 NR 328 (SC) 343-344.

the *Corporal Punishment* case, *Curras, Carracelas (1)* and *Namunjepo*) did not expressly reference Article 144 of the Constitution though they clearly tackled issues with a public international law dimension.

3.1 *S v Curras* (HC 1991)

From 22 September 1990 to 24 November 1990, the accused, Curras, a 39-year old Spanish national fished in the exclusive economic zone (EEZ) of Namibia without a permit or a licence.³⁴¹ After the state arrested Curras, the prosecutor charged him with violating section 22A(4) (b), read with other provisions,³⁴² of the Sea Fisheries Act, 58 of 1973,³⁴³ and further read with the provisions of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990 (the 'EEZ Act')³⁴⁴ and provisions of the Criminal Procedure Act, 51 of 1977 (CPA).³⁴⁵

Article 22A(4) (b) of the Fisheries Act prohibits the master of a fishing vessel in Namibia's EEZ without a permit or licence granted in respect of the vessel. Curras pleaded guilty to the charges.

The case therefore concerned the sentence the High Court of Namibia could impose on Curras. Article 73(3) of the 1982 United Nations Convention on the Law of the Sea (LOS) rules out imprisonment as a penalty for violating fisheries laws and regulations in the EEZ.³⁴⁶ In an obiter (i.e., passing remark), Levy J said that:

... even if art 73.3 of the [LOS] is to be regarded as part of customary international law, rules of such law inconsistent with local law are not enforceable.

In passing that remark, the judge relied on two precedents: *Nduli*³⁴⁷ and *Petane*.³⁴⁸ Interestingly, this remark matches the position

³⁴¹ *S v Curras* 1991 NR (HC). For a case with similar facts, see *S v Pineiro* 1991 NR 424 (HC).

³⁴² Sections 1, 6, 16, 17, 18, 22A, and 24(1) of the Sea Fisheries Act, 58 of 1973.

³⁴³ The Marine Resources Act, 27 of 2000, repealed the Sea Fisheries Act, 29 of 1992, which in turn had repealed the Sea Fisheries Act, 58 of 1973.

³⁴⁴ Sections 1, 4, 5, 7 and 8 of the EEZ Act.

³⁴⁵ Sections 90 and 250 of the Criminal Procedure Act, 51 of 1977.

³⁴⁶ Convention on the Law of the Sea, 1833 U.N.T.S. 3; (1982) 21 I.L.M. 1261.

³⁴⁷ *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A).

³⁴⁸ *S v Petane* 1988 (3) SA 51 (C) 56.

of Article 144 of the Constitution, which subjects the application of “the general rules of public international law and international agreements” to Acts of Parliament.

While this represents the position in Namibian law, in international law, however, rules of custom bind states even if such law contradicts local law. This implies that an international court would have achieved a different outcome.

In any event, the court should not have cited case law (i.e., *Nduli* and *Petane*) as authority for the proposition that local law supersedes conflicting rules of customary international law because it is local law, and not case law, that prevails over rules of international custom. Besides, the judge never expressly referred to Article 144 of the Constitution.

3.2 S v Carracelas (HC and SC 1992)

Like *Curras*, these three closely related cases involved persons arrested and tried for fishing within Namibia’s EEZ without a permit or a licence, thus violating section 22A(4)(b) of the Sea Fisheries Act.³⁴⁹ In the case, the accused persons challenged whether the crimes the prosecutor alleged that they have committed took place precisely within the EEZ.³⁵⁰ The case revolved around the point where the northern boundary of Namibia’s EEZ is precisely located.

The prosecution produced evidence that Cabinet delineated the northern boundary of Namibia’s EEZ. Defense counsel objected that the Cabinet does not have the legal authority to draw that boundary.

Frank J held that no articles in the Namibian Constitution empower the state to fix the line separating its EEZ from that of its neighbours. The judge observed that, by virtue of section 5 of the EEZ Act,³⁵¹ the main way for Namibia to determine the extent of its

³⁴⁹ *S v Carrecelas and Others* (1) 1992 NR 322 (HC); *S v Carrecelas and Others* (2) 1992 NR 329 (HC); and *S v Carrecelas and Others* (3) 1992 NR 336 (SC).

³⁵⁰ *S v Carrecelas and Others* (1) 1992 NR 322 (HC).

³⁵¹ Section 5 reads as follows: “If, in determining the extent of the territorial sea or exclusive economic zone of Namibia or after having so determined it, it infringes or overlaps with the territorial sea, exclusive economic zone or any other maritime zone, as the case may be, of any other State, the extent of the territorial sea or exclusive economic zone of Namibia may be determined or altered by agreement with the State concerned, and pending the conclusion of such an

EEZ is to enter into a treaty with the neighbours concerned for that purpose. He also remarked that the mere fact of entering into such an international treaty did not automatically make the treaty part of Namibian law because Parliament would need to first ratify it.³⁵²

3.3 *S v Martinez* (HC 1993)

Martinez acted as captain of a Spanish vessel that fished within Namibia's exclusive economic zone (EEZ) without a permit or licence. He later faced charges of contravening section 8(1) or 22A(4) (b) of the Sea Fisheries Act,³⁵³ which make it a criminal offence to use a foreign fishing vessel within a fishing zone without a permit or licence.

On the issue as to whether the High Court can impose a direct or indirect imprisonment, defense counsel argued that the Court could not sentence Martinez to imprisonment because the 1982 United Nations Convention on the Law of the Sea (LOSC), which bound Namibia, expressly prohibits imprisonment for violating regulations in any EEZ. The High Court held that, because the LOSC still lacked 13 signatures before it could become law, the LOSC could only bind Namibia if the 1969 Vienna Convention on the Law of Treaties also bound Namibia. The court remarked that, in terms of the Vienna Convention, parties to a convention that has not reached binding status are nevertheless obliged to adhere to the terms of that convention as if it did enjoy binding status.³⁵⁴ And it observed that it could not establish whether the United Nations Council for Namibia, which legally acted for or on behalf of Namibia, signed the Vienna Convention.³⁵⁵

In *Martinez*, the High Court misunderstood how international law works. It does not matter whether Namibia (through the Council for Namibia) signed the Vienna Convention or not, since – for many

agreement or if no such agreement can be reached, the extent of the territorial sea or exclusive economic zone of Namibia, as the case may be, may be determined or altered by Namibia as it deems fit.”

³⁵² *S v Carracelas and Others* (1) 1992 NR 322 (HC) 327.

³⁵³ Sea Fisheries Act, 58 of 1973.

³⁵⁴ Though it did not mention the relevant provision expressly, the court was referring to Article 18 of the Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331; (1969) 8 I.L.M. 679.

³⁵⁵ *S v Martinez* 1993 NR 1 (HC) 13-14.

years – the rules contained in the Convention belong to customary international law.³⁵⁶

3.4 *Namunjepo v Commanding Officer, Windhoek Prison* (SC 1999)

In *Namunjepo*,³⁵⁷ four inmates escaped from Windhoek Prison on 11 August 1997. By 12 September, the authorities had recaptured all the four fugitives. Shortly afterwards, they put the four inmates in chains (i.e., leg irons). The four inmates argued that their detention in chains amounted to punishment and torture, thus violating Article 8 of the Namibian Constitution on the right to dignity. They accordingly sought an order from the court declaring their detention in chains unconstitutional.

Chief Justice Strydom, as he then was, noted “the accession of Parliament to both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention on Civil and Political Rights (ICCPR) on 28 November 1994”.³⁵⁸ More importantly, he stressed that those two international treaties contain provisions similar to Articles 8 (on dignity) and 10(1) (on equality) of the Namibian Constitution.³⁵⁹ He added that:

[t]he acceptance by Parliament of these Conventions as well as the First Optional Protocol to the ICCPR is a continued expression of and confirmation of the high norms and values of the Namibian people as contained in the Constitution and expressed by other Institutions. When the Court must now make its value judgment it can also not ignore previous expressions in those judgments which were based on those very norms, sensitivities and aspirations and as a result of which certain constitutional principles were articulated.

³⁵⁶ C.A. Bradley, ‘Treaty Signature’ in D. Hollis (ed) *The Oxford Guide to Treaties* (Oxford University Press 2012) 8.

³⁵⁷ *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) 284Hff.

³⁵⁸ *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) 284

³⁵⁹ *ibid.*

Relying on those two instruments as well as Rules 33 and 34 of the UN Standard Minimum Rules for the Treatment of Prisoners, which prohibits chains or irons to restrain prisoners, the Supreme Court concluded that the detention of the inmates in chains violated Article 8 of the Constitution.

While the Chief Justice effectively applied international law to answer the legal question and interpret the Constitution in *Namunjepe*, he assumed that Parliament ‘acceded’ to the CAT and the ICCPR. He did not, however, clarify

- (1) whether Parliament ‘accepted’ those two conventions because the Constituent Assembly wrote in Article 8 provisions that resembled those of the two conventions;
- (2) whether Parliament ‘acceded’ to the two conventions because they ‘ratified’ them; or
- (3) whether it ‘acceded’ to the conventions because it had passed legislation domesticating the conventions.

Apart from the first of the above three possibilities, no evidence in the judgment proves that the Namibian parliament adopted legislation domesticating the CAT and the ICCPR, or that it resolved to ratify them. Moreover, Strydom CJ assumed that Parliament, and not government, is the body mandated by the Constitution to ratify international treaties. As I explain in Chapter 7, no provisions in the Namibian Constitution explicitly authorize Parliament to ratify international treaties. Last but not least, the court in *Namunjepe* did not expressly mention Article 144 of the Constitution when it analyzed the CAT and the ICCPR and how they applied in Namibia.

3.5 South African Poultry Association v Minister of Trade and Industry (SC 2018)

In this matter, the Namibian Minister of Trade and Industry imposed trade measures on 5 April 2013 in terms of the Import and Export Control Act³⁶⁰ to protect the fledgling domestic poultry industry.³⁶¹ The South African Poultry Association (SAPA) and five of its South African members engaged in the poultry industry

³⁶⁰ Import and Export Control Act, 30 of 1994.

³⁶¹ *South African Poultry Association and Others v Minister of Trade and Industry and Others* (SA 37/2016)[2018] NASC (17 January 2018). Hereinafter ‘*SAPA*’.

challenged the trade measure imposed by the Minister in the High Court on the ground that it violated the 2002 Southern African Customs Union (SACU) Agreement and the 1992 Southern African Development Community (SADC) Treaty.

The respondents (i.e., the Minister, the government, and the Namibia Poultry Industries (Pty) Ltd) objected that SAPA and the other appellants had unduly delayed in lodging an application to review the Minister's trade measure. The High Court agreed with the respondents on the appellants' delay and dismissed the applicants' review application.

The plaintiffs appealed to Supreme Court against the High Court decision. The Supreme Court upheld the High Court's decision on the appellants' unreasonable delay. But, on the question of whether the High Court should have condoned the delay, the Supreme Court unanimously ruled that the issues involved in the matter, namely Article 144 of the Constitution and the application of international treaties in Namibia, served public interest:³⁶²

[T]he public interest would be served by the ventilation and determination of the application of Article 144 of the Constitution and the extent, if any, to which international treaties can be enforced in domestic courts.

For that reason, the Supreme Court condoned the appellants' delay in launching their court application and remitted the case to the High Court so that it can decide the merits of the case.³⁶³

Although the Supreme Court refrained from determining the merits of the case, the parties presented their arguments on the merits to the extent that it guided the court in deciding whether to condone or not the late filing of the plaintiffs. The arguments put forth by the lawyers acting on the Minister and government's behalf speak to the place of international law within the Namibian legal system.

As paraphrased in the judgment, Jeremy Gauntlett SC's argumentation in the Minister's defense contains at least five points.³⁶⁴ First, he argued that national courts cannot enforce trade

³⁶² *SAPA* [71].

³⁶³ *SAPA* [81].

³⁶⁴ *SAPA* [37]-[38].

treaties under international law. Second, he pleaded that treaties contradicting national legislation would not, to that extent, form part of Namibian law under the Constitution. In addition, Gauntlett submitted that the Minister's trade measure was authorized by section 2 of the Export and Import Control Act. Fourth, the trade measure does not conflict with the treaty prohibition contended for by the appellants. Lastly, he maintained that imposing trade measures "fall[s] within the heartland of executive discretion" and that the decision to impose such measures in pursuing an industrial policy aimed at creating employment and reducing balance-of-payment deficits is "policy-laden" and involves "polycentric decision-making".

Mr. Sisa Namandje, who represented the government, argued that, where international treaties contradict national legislation, the latter prevails by virtue of Article 144 of the Constitution.³⁶⁵ He further argued that before there could be any question of international law becoming domesticated, the principle of legality would require that the state publish the provisions of that law.³⁶⁶

From an international law perspective, most of Gauntlett's submissions do not stand on a firm footing. First, nothing in international law prevents a state or its courts from enforcing an international trade treaty domestically. Moreover, the fact that section 2 of the Import and Export Control Act may have authorized the Minister to impose the impugned trade measure does not mean that the measure does not violate international law, the SACU Agreement or the SADC Treaty. Plus, customs unions invade trade policy space far more than most trade agreements. It thus makes little sense to complain that SACU 'falls within the heartland of executive discretion', that infant-protection measures are 'policy-laden' or involve 'polycentric decision-making': The deeper the form of economic integration, the smaller a state's trade policy space.

Namandje's reasoning – that the principle of legality calls for the publication of ratified treaties before domestic courts can apply them – is more convincing. But, as I show in the next chapter, this sound argument turns on the meaning of 'publication'.

³⁶⁵ *SAPA* [41].

³⁶⁶ *ibid.*

4. *Likany* and shortcomings in applying international law in Namibia

Like the Supreme Court said in *South African Poultry Association*, public interest is generally served by bringing certainty and finality to administrative action or the exercise of power by a minister acting within a statute to regulate trade by restricting imports.³⁶⁷ Hopefully, the High Court – to which the Supreme Court has remitted the matter relating to the application of Article 144 and ratified treaties in Namibia – will bring certainty and finality to the shortcomings plaguing Namibian courts in applying international law.

The *Likany* case illustrates three of those shortcomings in how lawyers apply international law in the Namibian legal system, namely the lack of (1) analytical depth, of (2) theoretical framework, and of (3) hierarchical ordering. Before I explain these challenges, I must first outline the case that illustrates them.

The shortcomings I mentioned above came to the fore in the context of the Caprivi high treason trial – the longest (and perhaps most expensive) trial in Namibia's history as an independent nation. In August 1999, a group of armed men took up arms against the Namibian government and attempted to break the Caprivi (now Zambezi) region away from the rest of Namibia. The attempt at secession failed. Many of the culprits fled to neighbouring countries, Zambia and Botswana. The people accused of having attempted to secede Caprivi from Namibia were arrested, charged and prosecuted in the High Court for high treason.

The arrest of many of those who fled to Zambia led to a first case decided by the Supreme Court: the *Mushwena* case I summarized in an earlier section in this chapter. On the other hand, the arrest of fugitives in Botswana led to two other cases: *Munuma* (decided in 2016) and *Likany* (2017). In all these three cases, the Supreme Court had to settle the key question whether the High Court of Namibia has jurisdiction to try accused persons brought before court in violation of international law. Mainly, in all these three judgments, the Supreme Court of Namibia clearly held that bringing accused persons before court in violation of international law would strip the

³⁶⁷ *SAPA* [62].

court of jurisdiction. The apex court unequivocally and without reservation affirmed the standing of international law in the Namibian legal system.

4.1 Lack of clear framework and systematic analysis

However, the three judgments revealed a few fundamental shortcomings in applying international law. First, *the Supreme Court of Namibia did not develop a clear framework for applying Article 144* of the Constitution the way it did for Article 10 of the Constitution in several landmark cases. For instance, in the *Mwellie* case, the court mounted a clear framework for analysing claims by litigants that the state discriminated because the stated acted in a way that bore no rational connection to legitimate government objectives. As a result, the three decisions (i.e., *Mushwena*, *Munuma*, and *Likany*) have not approached the application of international law in domestic courts uniformly.

Second, *the higher courts have not yet systematically analysed Article 144*.³⁶⁸ Courts, and the Supreme Court specifically, have so far applied Article 144 as if interpreting it posed no problem. This is a wrong assumption, as I show at several junctures in this chapter.

4.2 Lack of hierarchical ordering

Particularly, in *Likany*, the Supreme Court appeared to betray a *lack of hierarchal ordering of international law within the domestic legal system*. The Court applied Roman-Dutch law, as reflected in *S v Ebrahim*,³⁶⁹ as opposed to international custom or treaties, to support its holding that violating international law deprives courts of jurisdiction. This move raises the question as to whether common law (or case law, for that matter) prevails over international law. In any event, it leaves open questions about where international law stands exactly within the Namibian legal system.

These shortcomings can ramify far beyond the court cases that originally produced them. To be sure, the judgment in *Likany* erred by holding that the High Court did not have competence to try the accused because Namibia violated international law when it effected

³⁶⁸ Tshosa already remarked that Namibian courts have not yet analyzed Article 144 of the Constitution.

³⁶⁹ 1991 (2) SA 553 (AD).

an arrest on foreign soil, i.e., Botswana.³⁷⁰ Patently, the court applied the law incorrectly, as the rules on state responsibility clearly provides that consent precludes the wrongfulness of an internationally wrongful act. If the Supreme Court had relied on customary international law instead of Roman-Dutch law, it would have reached that conclusion. The headache now is that, since the Court reversed – for the first time in its history – its own decision in *Mushwena* for the wrong reasons, the Court has created a legally unsound precedent and produced three poorly reasoned judgments. Actually, because *Likany* drew on the logic it used in *Munuma*, the Court has handed down of trilogy of bad decisions.

Taken together, the international jurisprudence in Namibia is cacophonous. Some court decision has even contradicted the express wording of Article 144 of the Constitution. The judiciary, the Supreme Court in particular, will need to work hard to unify that jurisprudence and articulate a coherent philosophy.

One way of achieving this is through the technique of legal interpretation. I mean, not only interpreting Article 144 of the Namibian Constitution, but most importantly construing the many treaties that Namibia has entered into.

³⁷⁰ See D. Zongwe and N. Ndeunyema, 'How the Supreme Court Once Got it Wrong – Thrice!' *The Namibian* (Sept. 15, 2017) 11.

TREATIES AND THEIR INTERPRETATION

The importance of treaties for the development of international law can never be overemphasized. Most disputes in international law have something to do with the application and interpretation of treaties. In the *South West Africa Cases*, the nature of the Mandate for South West Africa as an international treaty was in dispute. The Court interpreted the provisions of the Mandate and found that they clearly imply that the Mandate was intended to be an international treaty or convention.³⁷¹ The legal interpretation of treaties is required by the imprecision, interaction and inter-conditioning of treaty norms.³⁷² Nonetheless, the greatest strength is the clarity and precision it brings to the regulation of international and domestic affairs.

Furthermore, treaties provide for most rules in international law. They embody the practical content of state relations³⁷³ as they are the fruits of agreements among states on myriad aspects of both municipal law and international law. Plus, the vast majority of international organizations, including the United Nations, derive their legal basis from a multilateral treaty.³⁷⁴

Many multilateral conventions are drawn up under the auspices of the International Law Commission (ILC) and combine elements of the codification of customary international law together with provisions that seek to further the progressive development of that law.³⁷⁵ The ILC drafted the 1969 Vienna Convention on the Law of Treaties, which codifies the rules on the law of treaties. The ILC also codified rules on state responsibility, which is another spinal area of international law.

³⁷¹ *South West Africa Cases (Preliminary Objections)*, *Ethiopia v. South Africa; Liberia v. South Africa*, Judgment of 21 December 1962, I.C.J. Reports 1962, p.319.

³⁷² See J. Maftai and V.L. Coman, 'Interpretation of Treaties' (2012) 8 *Acta Universitatis Danubius* 16.

³⁷³ I. Brownlie, *Principles of Public International Law* (6th ed. Oxford) 607.

³⁷⁴ *ibid.*

³⁷⁵ J. O'Brien, *International Law* (Cavendish Publishing Limited 2001) 80.

Treaties serve a number of purposes: Among other functions, they form constitution for international organizations, they serve as a source of international law, they enable the transfer of territory, they govern commercial transactions and relationships, they protect foreign investments, they set environmental standards for private firms,³⁷⁶ they guarantee fundamental rights and freedoms, and they allow the resolution of international disputes. And to ensure publicity,³⁷⁷ the Charter of the United Nations³⁷⁸ and the 1969 Vienna Convention on the Law of Treaties³⁷⁹ require states to register treaties with the secretariat of the United Nations, which publishes them in the United Nations Treaty Series (U.N.T.S.).

1. The law of treaties and the 1969 Vienna Convention

Treaties are themselves regulated by the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention is a comprehensive set of rules governing the major areas of the law of treaties. It is therefore a legislative treaty. It is the treaty on treaties. It entered into force on January 27th, 1980. In addition, the Vienna Convention is in part declarative of customary international law and in part progressively developing the rules of international law.³⁸⁰ It is the most authoritative statement of the law on treaties.

The preamble of the Vienna Convention states that areas of the law of treaties that have not been provided for in the Vienna Convention will still be governed by the rules of customary international law.³⁸¹ The areas not covered by the Convention are treaties between states and international organizations or treaties

³⁷⁶ N. Affolder, 'The Market for Treaties' (2010) 11 Chicago Journal of International Law 159.

³⁷⁷ J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 415.

³⁷⁸ Article 102 of the Charter of the United Nations, 1945.

³⁷⁹ Article 80 of the Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331; (1969) 8 I.L.M. 679.

³⁸⁰ A. Aust, *Vienna Convention on the Law of Treaties* (1969) (Oxford 2006) 1.

³⁸¹ The International Court of Justice made general observations in several cases as to the interrelationship between these two sources of international law. The most important of these are the; 1969 *North Sea Continental Shelf* cases and the 1986 *Nicaragua* case.

between one or more international organizations; the effect of war on treaties; and state succession.

The Vienna Convention defines a treaty as “an international agreement concluded between States in written form and governed by international law...”³⁸² The definition of ‘treaty’ in the 1969 Vienna Convention and the Convention’s scope of application as a whole are restricted to treaties between states only. It follows from that definition that treaties can have many names as long as they meet certain definitional requirements,³⁸³ namely (1) the agreement, (2) the written form; (3) the participation of at least two states in that agreement, and (4) the regulation of that agreement by international law. I must stress that the agreement can only bind two or more states; it cannot bind a state and an individual.

It does not matter whether a treaty is called convention, covenant, charter, protocols, accords, etc.,³⁸⁴ provided that it satisfies those four requirements. However, in the United States, the term ‘treaty’ does matter as it is a technical term that distinguishes the kind of international agreements that requires consent and approval from the Senate.³⁸⁵ In the States, international agreements other than treaties do not require such consent and approval from the Senate.

Like I said in the opening lines of this chapter, the *South West Africa Cases* inquired into the nature of the Mandate for South West Africa. The International Court of Justice held that, for its confirmation, the Mandate took the form of a resolution of the Council of the League of Nations but it was obviously of a different character.³⁸⁶ The Mandate was not an executive action taken in terms of the Covenant of the League of Nations.³⁸⁷ Like all other similar mandates, the Mandate for South West Africa was a special type of instrument composite in nature, consisting of a definite agreement, a provisional or tentative agreement on the terms of the Mandate

³⁸² Article 2(1) (a).

³⁸³ O’Brien op cit 80.

³⁸⁴ M. Fitzmaurice and A. Quast, *Law of Treaties* (University of London Press 2007) 11.

³⁸⁵ T. Buergenthal and S.D. Murphy, *Public International Law, in a nutshell* (5th edn, West Publishing Co 2013) 107.

³⁸⁶ *South West Africa Cases (Preliminary Objections)*, *Ethiopia v. South Africa; Liberia v. South Africa*, Judgment of 21 December 1962, I.C.J. Reports 1962, 319.

³⁸⁷ *ibid.*

between the 'Principal Allied and Associated Forces', and a formal confirmation agreement of the Mandate terms.³⁸⁸ It is "an instrument having the character of a treaty or convention and embodying international engagements for the Mandatory as defined by the Council and accepted by the Mandatory."³⁸⁹

The definition of 'treaty' in the 1969 Vienna Convention does not apply to agreements between states and international organizations, and between international organizations.³⁹⁰ Those agreements are regulated by the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations and Between International Organizations. This type of agreements has special rules, which is why it became necessary to adopt a separate treaty to provide for them.

Some agreements between states and international organizations may expressly or by implication be governed by national law.³⁹¹ It is not uncommon for constituent treaties as well as privileges and immunities agreements between international organizations and states, including some status-of-force agreements (SOFAs),³⁹² commonly empower those organizations to perform legal acts under national law, such as entering into contracts or acquiring property.³⁹³ Such agreements would not qualify as treaties, but contracts. The same holds true for oral agreements: They are not 'treaties' within the

³⁸⁸ *ibid.*

³⁸⁹ *ibid.*

³⁹⁰ O'Brien *op cit* 358 -359.

³⁹¹ Mr I. Seidl-Hohenveldern: Ninth Commission, Rapporteur, *The Law Applicable to Joint International State or Quasi-State Enterprises of an Economic Nature* (Session of Helsinki, Justitia Et Pace, Institut De Droit International 1985), for more on this see C. Wickremasinghe, *The Jurisdictional Immunities of International Organisations and Their Officials* (London School of Economics and Political Science 2003).

³⁹² A status-of-force agreement (SOFA) refers an agreement between a host state and another state or an international organization (such as the United Nations) that stations military forces in the host state.

³⁹³ See A. Reinisch, 'Contracts Between International Organizations and Private Law Persons,' in Max Planck Encyclopedia of Public International Law (2011) paragraph 3, Available at <<http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1390?rskey=NC26bU&result=5&prd=EPIL>> Last accessed 28 October 2018. See also S. Mullin, 'Status of Forces Agreements – A Primer' (2018) National Law Review 1.

meaning of the 1969 Convention. Nevertheless, oral agreements can create rights and obligations for states.³⁹⁴

2. The making of treaties

2.1 General principles

The Vienna Convention on the Law of Treaties does not say how a state has to adopt a treaty. International law is silent on this point.³⁹⁵ Put another way, there is no requirement as to the form of making treaties under international law. It is the legal system of each state that prescribes the form and procedure for the adoption of a treaty. Treaties are negotiated and made based on the consent and intentions of the state parties.

In practice, states negotiate and make treaties following usage, which varies from state to state. Bilateral treaties, and multilateral treaties between a few states, tend to originate from and are negotiated by the foreign affairs ministries of the state parties to those treaties.³⁹⁶ By contrast, multilateral treaties involving a large number of countries tend to be negotiated at international diplomatic conferences by diplomatic delegations from states parties.³⁹⁷ It is a common practice that, before the diplomatic conference takes place, states parties and international organizations prepare working papers and draft proposals for consideration by the various delegations at the conference.

Generally speaking, treaties enter into force when states parties express their intention to be bound by the treaties in the case of bilateral treaties and when a specified number of states accept the treaties in the case of multilateral treaties.³⁹⁸ Thus, for both bilateral and multilateral treaties, the entry into force of the treaties will take place when states parties ratify it.

³⁹⁴ See A. Aust, 'Vienna Convention on the Law of Treaties (1969)' in Max Planck Encyclopedia of Public International Law (2006) paragraph 12, Available at <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>> Last accessed 28 October 2018.

³⁹⁵ O'Brien op cit 340 -341.

³⁹⁶ Buergenthal and S.D. Murphy op cit 109.

³⁹⁷ Dugard op cit 416.

³⁹⁸ O'Brien op cit 340 -341.

Ratification is an act whereby a state, through its Head of State, its foreign affairs minister or any other duly authorized person,³⁹⁹ expresses its consent to be bound by a treaty.⁴⁰⁰ That expression of consent to be bound by a treaty is usually contained in an instrument of ratification. Ratification consists of two distinct steps, namely the act of the relevant state organ and the international procedure that brings a treaty into force by the formal exchange or the deposit of instruments of ratification. The formal exchange or the deposit of ratification instruments are the means by which a state expresses its consent to be bound by a treaty.⁴⁰¹

A treaty that provides for ratification typically provides for prior signature as well. In such cases, signature serves to authenticate the text of a treaty⁴⁰² and represents an agreement in principle by the states concerned. A state that has signed a treaty is not bound by it; a state is bound by treaty only if it has ratified it. However, a signatory state has the obligation to avoid frustrating the purpose and object of the treaty even if it has not ratified it.⁴⁰³

When a state, which has not ratified a treaty already ratified by other states, wishes to join other states in expressing consent to be bound by that treaty, it can do so by accession, acceptance or approval.⁴⁰⁴ Signature, ratification, accession, acceptance, and approval are the primary means for a state to express its consent to be bound by a treaty.⁴⁰⁵ Any other means of expressing consent to be bound can be devised by agreement between the parties.

2.2 Treaty-making in Namibia and its significance

The procedure to follow for ratifying international treaties varies from country to country. In the US, the power to enter into treaties vests with the President, subject to “the advice and consent of the

³⁹⁹ Article 7 of the Vienna Convention on the Law of Treaties, 1969.

⁴⁰⁰ Article 14 of the Vienna Convention on the Law of Treaties, 1969.

⁴⁰¹ O'Brien op cit 335.

⁴⁰² Article 10 of the Vienna Convention on the Law of Treaties, 1969.

⁴⁰³ Dugard op cit 334.

⁴⁰⁴ *What is the difference between signing, ratification and accession of UN treaties?* Retrieved from <http://ask.un.org/faq/14594>. Accessed on 11/03/2017.

⁴⁰⁵ The Treaty Section of the Office of Legal Affairs, *Treaty Handbook* (United Nations Publication 2012) 8.

Senate.”⁴⁰⁶ In the United Kingdom, that power is the prerogative of the Crown.⁴⁰⁷ Since 1890, British practice has, however, been for the Crown to seek that the Parliament approves the ratification of treaties, although the law does not require parliamentary approval.⁴⁰⁸ South Africa followed the British practice until 1994⁴⁰⁹ and Namibia followed that practice until 1990. Under the 1996 Constitution of South Africa, the national executive negotiates and signs treaties,⁴¹⁰ but treaties bind South Africa only upon approval by resolution in both the National Assembly and the National Council of Provinces.⁴¹¹

In Namibia, it is not clear who, between the President of the Republic and the National Assembly, has the power to ratify treaties. Contrary to various commentaries on the subject,⁴¹² the text of the Namibian Constitution does not unambiguously clarify the position. This is a far-reaching question because a party in the future may challenge the legality of Namibia’s ratification and application of treaties. For instance, Namibia’s declared threat to pull out from the Rome Statute of the International Criminal Court (ICC) would be carried by the President or the National Assembly, depending on whether a competent court in Namibia finds that the President or the Assembly has the legal power to ratify treaties. This is exactly what happened in the case of South Africa, where the North Gauteng High Court held that the government’s denunciation of the Rome Statute by presenting the Secretary General of the United Nations with a notification of withdrawal violated the South African Constitution because the government did not obtain prior approval by the

⁴⁰⁶ Article 2, section 2(2) of the Constitution of the United States, 1787.

⁴⁰⁷ *R v Secretary of State Ex parte Rees-Mogg* [1994] 1 All E.R. 457 CA.

⁴⁰⁸ D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 644.

⁴⁰⁹ Dugard op cit 415.

⁴¹⁰ Section 231(1) of the Constitution of the Republic of South Africa, 1996.

⁴¹¹ Section 231(2) of the Constitution of the Republic of South Africa, 1996.

⁴¹² See, for example, O. Tshosa, ‘The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy’ (2010) 2 *Namibia Law Journal* 3. See also Judge Frank’s comment in *S v Carreccelas and Others* (1) 1992 NR 322 (HC) on who has the power to ratify international treaties in the Namibian context.

National Assembly and the National Council of Provinces.⁴¹³ The North Gauteng High Court affirmed the “trite” principle that, “where a constitutional or statutory provision confers a power to do something, that provision necessarily confers the power to undo it as well.”⁴¹⁴ It therefore ruled that, on a textual construction of section 231(2) of the Constitution, South Africa can withdraw from the Rome Statute only after parliament approves the withdrawal and repeals the Implementation Act.⁴¹⁵

The “trite” principle of statutory interpretation invoked by the North Gauteng High Court in South Africa also applies to Namibia and underlines the significance of determining in the Namibian context whether the President or the National Assembly can make and unmake treaties.

2.3 Relevant provisions in the Namibian Constitution

Article 32(3) (e) of the Namibian Constitution empowers the President of Namibia “to negotiate and sign international treaties, and to delegate such power”. It subjects this power to Article 63(2) (e) of the Constitution, which conditions ratification upon some sort of approval by the National Assembly, though it does not specify whether such approval constitutes the ratifying act.

Article 63(2) (e) lays down that the National Assembly “shall agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3) (e)”. The word ‘shall’ in Article 32(3) is ambiguous as it can entail an obligation, a precondition or a simple function. It is not clear which one of these three meanings the Namibian constitutional drafters intended. Or was it a legislative oversight? The wording of Article 32(3) (e) of the Constitution suggests that the Namibian Parliament “agree[s] to the ratification”, and does not itself ratify treaties. This

⁴¹³ *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017).

⁴¹⁴ *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017) paragraph 53.

⁴¹⁵ *ibid.*

position differs from that of South Africa. Section 231(2) of the Constitution of South Africa provides that “... an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces”

In *Carrecelas (1)*, a case involving the illegal fishing within Namibia’s exclusive economic zone without a permit or a licence, Frank J remarked that the mere fact of entering into such an international treaty did not automatically make the treaty part of Namibian law because Parliament would need to first ratify it.⁴¹⁶ To support this remark, the High Court judge cited Articles 32(3) (e) and 63(2) (e) of the Constitution as well as the case *Pan American World Airways v SA Fire and Accident Insurance*.⁴¹⁷

For one thing, as I have just demonstrated, Articles 32(3) (e) and 63(2) (e) of the Constitution do not expressly or clearly empowers the Namibian Parliament to ratify treaties, but to “agree to the ratification” of treaties. For another thing, the Appellate Division decided the *Pan American World Airways* case in 1965. At that time, parliamentary sovereignty prevailed in both Namibia and South Africa – a system superseded by new constitutional supremacy in the two countries in 1990 and 1994, respectively. This means that the authority to ratify international treaties must derive from the supreme constitution, and not from an outdated notion of a parliament-sovereign.

Like Frank J in *Carracelas (1)*, Tshosa concludes that, for international treaties to bind Namibia at the international level the Namibian Parliament must first ratify them.⁴¹⁸ In his opinion, it is Parliament that expresses consent to be bound by treaties on the international plane. Tshosa suggests that the President only signs treaties; he or she does not ratify them. In fact, Article 63(2) (e) of the Constitution does not expressly provide that the President ratifies treaties. The Constitution only stipulates that the President signs treaties. Signing treaties is one of the ways a state expresses its intention to be bound by a treaty. Article 11 of the Vienna

⁴¹⁶ *S v Carracelas and Others* (1) 1992 NR 322 (HC) 327.

⁴¹⁷ *Pan American World Airways Inc v SA Fire and Accident Insurance Co Limited* 1965 (3) SA 150 (A).

⁴¹⁸ Tshosa op cit 19 and 29.

Convention mentions the different ways in which a state may express its intention to be bound by a treaty:

[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12(1) of the Vienna Convention explains the nature of a signature as follows:

The consent of a State to be bound by a treaty is expressed by the signature of its representative when: (a) the treaty provides that signature shall have that effect; (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

Another important question concerns the time when international treaties become part of Namibian law. The answer to this question depends on whether the international treaty requires mere signature or ratification. If the treaty requires ratification, the treaty becomes part of Namibian law upon ratification. If the treaty requires only signature, such as agreements of a technical nature, then the treaty becomes upon signature. It is often difficult to determine whether an agreement is of a technical nature such that it does not need parliamentary approval in countries that require such approval for the ratification of treaties.

Tshosa⁴¹⁹ and Mtopa⁴²⁰ say that the treaty becomes part of Namibian law after an enabling law is passed to that effect. Is that a correct interpretation of Namibian law and international law? Actually, Article 144 of the Constitution does not require any enabling legislation before an international treaty forms part of Namibian law. Yet that constitutional provision serves as the basis for applying international law in Namibia. Thus, by necessary

⁴¹⁹ Tshosa op cit 20.

⁴²⁰ A. M. Mtopa, 'The Namibian Constitution and the Application of International Law – A Comment' (1990/1991) 16 South African Year Book of International Law 105.

implication and the force of logic, a treaty does not pass into Namibian law when Parliament enacts an enabling legislation; it becomes binding on Namibia at the very moment it is ratified because that is precisely the time when treaties bind Namibia externally or internationally.

Nonetheless, in *South African Poultry Association*, the lawyer who represented the Namibian government, Mr. Sisa Namandje, argued that before there could be any question of international treaty becoming domesticated, the principle of legality would require that the state publish the provisions of that treaty.⁴²¹ Namandje's argument sounds more persuasive than that of Tshosa and Mtopa. What makes it cogent is the point that, if it does not publish the terms of treaties, the state would offend the principle of legality. Still, the weight of Namandje's argument hinges on what 'publication' entails. Probably, by 'publication', he means that the state must publish the terms of the treaties it ratified in the *Government Gazette*. The *Black's Law Dictionary* and *Oxford Dictionary* suggest a broader definition. For those dictionaries, 'to publish' relates to "the action of making something generally known"⁴²² or of putting something in places "devoted solely to the uses of the public"⁴²³ or "visited by many persons and usually accessible to the public."⁴²⁴ Did the state sufficiently make the 2002 Southern African Customs Union (SACU) or the 1992 Southern African Development Community (SADC) Treaty generally known to the Namibian public? Namibian courts will have to answer those questions? More specifically, they will have to say whether 'publication' implies that the state must publish the provisions of ratified treaties in the *Government Gazette* or that it may by more general means inform the Namibian public of the treaty provisions.

⁴²¹ *South African Poultry Association and Others v Minister of Trade and Industry and Others* (SA 37/2016)[2018] NASC (17 January 2018) [41].

⁴²² 'Publication' *Oxford English Dictionary*
<<https://en.oxforddictionaries.com/definition/us/publication>> accessed 30 March 2019.

⁴²³ 'Publication' *Black's Law Dictionary* (2nd edn)
<<https://thelawdictionary.org/letter/p/page/165/>> accessed 30 March 2019.

⁴²⁴ *ibid.*

3. Types of treaties

There are three types of treaties, namely contractual, legislative and constitutional treaties. Contractual treaties provide specific matters, such as trade, investment and extradition. The 2002 Southern African Customs Union (SACU) Agreement spontaneously comes to mind. Legislative treaties codify entire fields of international law, such as the 1969 Vienna Convention on the Law of Treaties, which codify the law on treaties.

Constitutional treaties establish international organizations. The Charter of the United Nations is one such treaty. As the ICJ has recognized in its case-law, constitutional treaties are more complex in nature than other treaties. In the *Nuclear Weapons Advisory Opinion* case, the Court held:⁴²⁵

But the constituent instruments of international organizations [i.e., constitutional treaties] are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.

4. Pacta sunt servanda⁴²⁶

Treaties bind states on the basis of the principle of *pacta sunt servanda*. The principle of *pacta sunt servanda* holds that agreements or treaties must be fulfilled. A rule of customary international law,⁴²⁷ the

⁴²⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO) Advisory Opinion of 8 July 1996*, I.C.J. Reports 1996, pp.74-75, paragraph 19.

⁴²⁶ O'Brien op cit 83 (It is an accepted rule of customary international law that treaty obligations should in principle be respected).

⁴²⁷ H. Wehberg, 'Pacta sunt servanda' (1959) 53 American Journal of International Law 775. See M. Janis, 'The Nature of *Jus Cogens*' (1988) 3 Connecticut

principle is the pivot around which most of international law revolves.⁴²⁸ Article 26 of the Vienna Convention states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” The International Court of Justice in the *Nuclear Tests*⁴²⁹ cases held that “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.”

The binding nature of treaties stem from the consent of states by those treaties, as expressed in the instrument of ratification and other relevant documents. The notion of good faith in the *pacta sunt servanda* principle is itself a fundamental principle of international law.⁴³⁰

A state will be bound by a treaty it duly ratified even though, for one or another reason, it has not (yet) entered into force in its municipal law. This implication flows from the rule that no state may invoke the provisions of its internal law to justify its failure to comply with treaty obligations.⁴³¹ It also flows from the *pacta sunt servanda* principle and from the positive obligation of states to incorporate into their domestic law the international agreements that they have duly ratified.

In a similar vein, even when a treaty has not yet entered into force, a state is obliged to “refrain from acts which would defeat [its] object and purpose” in certain conditions.⁴³² It is obliged to refrain from frustrating the object and purpose of a treaty:⁴³³

1. if “it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty”, or

Journal of International Law 359, 361 (holding that the *pacta sunt servanda* principle is a *jus cogens* norm).

⁴²⁸ D. Sarooshi, *Some preliminary remarks on the conferral by States of powers on International Organizations* (NYU School of Law 2003) 11.

⁴²⁹ *Nuclear Tests (New Zealand v. France)*, 1974 I.C.J. Reports, 268.

⁴³⁰ Janis op cit 103.

⁴³¹ *ibid* 28.

⁴³² See Article 27 of the Vienna Convention on the Law of Treaties, 1969.

⁴³³ *ibid* Article 18.

⁴³⁴ *ibid*.

2. if “it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed”.

A state may apply a treaty or some of its provisions provisionally if the treaty so provides or if the states parties so agree.⁴³⁴ A state may apply a treaty provisionally between the time it signed it and its eventual ratification. Also, although a treaty is presumed to apply prospectively, a treaty may apply retrospectively if the parties so provide in the terms of the treaty.⁴³⁵

A person may only ratify a treaty on behalf of the state he or she represents if such a person produces evidence that he has been given ‘full powers’ to represent the state.⁴³⁶ Presidents, foreign ministers, do not need such evidence because their authority to enter into treaties on behalf of their respective states is inferred from their office.⁴³⁷

5. Third parties

The general principle is that international agreements do not apply to states that are not parties to those agreements. Article 34 of the Vienna Convention stipulates that “a treaty does not create either obligations or rights for a third state without its consent.” There are, nevertheless, two major exceptions to this general principle.⁴³⁸ The first exception is that, where a provision of a treaty has over time become a rule of customary international law, such treaty provision will bind even states that are not parties to that treaty. As I explained in Chapter 4, when a given treaty provision becomes a rule of customary international law it is applicable to all states, irrespective of whether they ratified that treaty or not, except for states that qualify as persistent objectors.

The second exception arises where a treaty assigns rights or obligations to a third party and that third party agrees to the

⁴³⁴ *ibid* Article 25.

⁴³⁵ *ibid* Article 28.

⁴³⁶ *ibid* Article 7(1).

⁴³⁷ *ibid* Article 7(2).

⁴³⁸ O’Brien *op cit* 80.

assignment. This exception is encapsulated in Article 36 of the Vienna Convention, which lays down that:

[a] right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

Examples of third party rights are in the treaties that give ships rights of free passage through the Suez Canal⁴³⁹ and the Kiel Canals.⁴⁴⁰

6. Invalidity of treaties

Treaties may be invalidated or prematurely terminated by municipal law, error, fraud and corruption, coercion, and *ius cogens* norms. Article 69 of the Vienna Convention states that an invalid treaty is void and without legal force.

A state may generally not invoke a rule of its internal law to invalidate a treaty that it has ratified. However, there are a few exceptions. The general principle and the exceptions are stated in Article 46(1) of the Convention:

[a] state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

⁴³⁹ Convention Respecting Free Navigation of the Suez Canal 1888, C. 5623; 79 B.F.S.P. 18; (1909) 3 A.J.I.L. Supp. 123. The Suez Canal is a 193-kilometer artificial sea-level waterway in Egypt that links the Mediterranean Sea to the Red Sea through Isthmus of Suez. One of the world's most heavily used shipping lanes, the Suez Canal separates Africa from Asia.

⁴⁴⁰ *The Wimbledon Case (France, Italy, Japan and the U.K. v Germany)*, 1923 P.C.I.J. Reports Series A, No. 1. The Kiel Canal is a 98-kilometer canal freshwater canal in the state of Schleswig-Holstein in northern Germany and links the Baltic Sea to the North Sea.

A good illustration of the application of this principle is *Cameroon v Nigeria*, where Nigeria argued that the Maroua Declaration of 1975 was not valid because the Head of State lacked the necessary competence. The Court rejected the argument because it noted that the Head of State had signed the Declaration and that a limitation was not manifest. Heads of State are deemed to have the necessary capacity to act on behalf of the states they represent such that any limitation on Nigerian President's capacity to sign the Declaration would have to be properly publicised for such limitation to be deemed 'manifest'.⁴⁴¹

A state may invoke error as a ground for invalidity⁴⁴² if it can prove the existence of an error which existed at the time of ratifying the treaty and which, if the state had known it before ratification, would have led the state in question to withhold its consent to be bound by the treaty. However, the state may not rely on such error if the state contributed to it.⁴⁴³ Further, a treaty will not be valid if a state ratified it as a result of threats or use of force.⁴⁴⁴

For example, the Hague District Court⁴⁴⁵ agreed with the defendant and held that the German-Czechoslovak Nationality Treaty of November 20, 1938 was invalid because it was "concluded under clear and unlawful duress".⁴⁴⁶

A treaty will be invalid if, at the time of ratifying it, it violates a *jus cogens* (i.e., peremptory) norm.⁴⁴⁷ When a treaty is found to be invalid because it contravenes a peremptory norm, the parties must eliminate the consequences of any act performed in violation of the peremptory norm.⁴⁴⁸ The parties are released from any further

⁴⁴¹ I.C.J. Reports 2002, paragraph 265.

⁴⁴² B. Conforti and A. Lobelia, *Invalidity and Termination of Treaties: The Role of National Courts* (1990) 45. Retrieved from <http://www.ejil.org/pdfs/1/1/1145.pdf>. Accessed on 11/03/2017.

⁴⁴³ O'Brien op cit 344.

⁴⁴⁴ R. R. Foulke, "Treaties" (1918) 18, 5, Columbia Law Review Association, Inc. 450 in Oppenheim, *International Law* (2nd ed. 1912) 547. "The duress of agents invalidates a treaty. A state may, of course, hold itself justified by political necessity in shaking off such an obligation (treaty enforced), but this does not alter the fact that such action is a breach of law." Retrieved from <http://www.jstor.org/stable/1111110>. Accessed on 11/03/2017.

⁴⁴⁵ *ILR* (1957) 437.

⁴⁴⁶ B. Conforti and A. Lobelia op cit 51.

⁴⁴⁷ Article 53 of the Vienna Convention on the Law of Treaties, 1969.

⁴⁴⁸ B. Conforti and A. Lobelia op cit 47.

obligations to perform the treaty. However, this extinction of obligations does not invalidate any right, obligation or legal situation created by the treaty before it is found to be invalid, and provided that such rights, obligations, or situation can continue without amounting to a violation of the peremptory norm.

As mentioned earlier, an invalid treaty is void and without legal consequences. If acts have nonetheless been performed in reliance on such treaty, then the parties must strive to restore the situation as it would have existed had the acts not been performed. What is more, acts performed in good faith before the treaty is found to be invalid do not become unlawful by the mere fact of the treaty's invalidity.⁴⁴⁹

7. Interpretation of treaties

One of the difficulties when it comes to the interpretation of treaties is to determine when the term of a treaty is so unclear or unreasonable that it warrants interpretation.⁴⁵⁰ In *Interpretation of Peace Treaties With Bulgaria, Hungary and Romania*, the International Court of Justice held that the principle known as the rule of effectiveness cannot justify a court in attributing to the provisions of an international treaty a meaning which is contrary to their letter and spirit.⁴⁵¹

There are three approaches to the interpretation of treaties, namely the textual, teleological, and intention-of-the-parties approaches.⁴⁵² The textual interpretation looks at the grammatical meaning of words and gives effect to them. The teleological approach identifies the purpose and object of a treaty and strive to give effect to them. Interpretations based on the intentions of the parties to a treaty seek to give effect to the intentions of the parties in entering into the treaty.

The South West Africa cases are a good illustration of these three approaches. The International Court of Justice adopted a teleological

⁴⁴⁹ Article 69(2) (b) of the Vienna Convention on the Law of Treaties, 1969.

⁴⁵⁰ Janis op cit 103.

⁴⁵¹ ibid 31-32.

⁴⁵¹ *Interpretation of Peace Treaties With Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion of 18 July 1950, I.C.J. Reports 1950, 221.

⁴⁵² Article 31 of the Vienna Convention on the Law of Treaties, 1969.

approach in construing the law. South Africa, on the other hand, employed a textual approach.⁴⁵³ The Government of South Africa argued in the *Namibia Case* that the C Mandate over South Africa was in its practical effect not far removed from annexation.⁴⁵⁴ South Africa arrived at that conclusion by analysing the intentions of some of the participants in the Paris Peace Conference, who approved a resolution which eventually became Article 22 of the Covenant on the League of Nations (which provides for the League's mandates system). The International Court of Justice dismissed South Africa's argument.⁴⁵⁵

It is true that as that Government points out, there had been a strong tendency to annex former enemy colonial territories. Be that as it may, the final outcome of the [Paris Peace Conference] negotiations, however difficult of achievement, was a rejection of the notion of annexation. It cannot tenably be argued that the clear meaning of the notion of mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its *object and purpose*.

This passage reveals the teleological perspective pursued by the ICJ. It expressly shows that the ICJ rejected the textual construction proposed by South Africa.

These three approaches to interpretation of treaties may give the impression that no other interpretive methods are available or allowed. Yet some courts, states, and scholars recognise that certain types of treaties demand a different mode of interpretation.⁴⁵⁶ For instance, international tax treaties may call for different approach to

⁴⁵³ For more on this see E. S. Landis, *South West Africa in the International Court Act II, Scene I* (1964) 49,2 Cornell Law Review, 179 – 227. Retrieved from <http://scholarship.law.cornell.edu/clr/vol49/iss2/1>. Accessed on 11/03/2017. See also J. Dugard, *International Law: A South African Perspective* (4th edn, Juta, 2011) 425-426 (observing that “The dispute between South Africa and the international community over South West Africa/Namibia provided a judicial battleground for the different schools of treaty interpretation.”).

⁴⁵⁴ *Namibia Case [Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)]*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, 16, paragraph 45.

⁴⁵⁵ *ibid* paragraph 50. Emphasis added.

⁴⁵⁶ R.M. Kysar, ‘Interpreting Tax Treaties’ (2016) 101 Iowa Law Review 1387.

interpretation because they are, by nature, dependent on domestic law, highly complex, and applicable to unique factual situations.⁴⁵⁷

Kasikili/Sedudu reminds you of the necessity of solving disputes through the interpretation of international legal texts. In that matter, the ICJ faced the Herculean task of determining a dispute in circumstances where scientific evidence put forth by both parties to the dispute pointed in diametrically opposed directions.⁴⁵⁸ Those circumstances meant that a textual interpretation of the 1890 Anglo-German Agreement specifying the spheres of influence of Germany and the United Kingdom, especially the boundary between German South West Africa and Botswana, could not decide the matter. And the maps presented by the parties did not evince the intention of Germany and the United Kingdom. The court had no other choice than to espouse a more expansive construction of the 1890 Agreement.

8. Reservations

If a state has any objection to a provision in a *bilateral* treaty, the solution is to renegotiate the treaty. Things become complicated when a state has an objection to a *multilateral* treaty. A state may be a party to multilateral treaty although the state has expressed a reservation that modify the legal effect of a provision or provisions of that treaty. When a state does not agree with certain provisions of a treaty, it can lodge a reservation in respect of those provisions or simply withhold its consent to be bound by the treaty, which it can do if it refuses to sign or ratify the treaty.

The Vienna Convention defines a ‘reservation’ as a

unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.⁴⁵⁹

⁴⁵⁷ *ibid.*

⁴⁵⁸ *Kasikili/Sedudu Island Case (Botswana/Namibia)*, I.C.J. Reports 1999, 1045.

⁴⁵⁹ Article 2(1) (d), Vienna Convention on the Law of Treaties, 1969.

When a state makes a declaration that its acceptance of a treaty is subject to a certain interpretation of the treaty, such conditional acceptance can be treated as a reservation.⁴⁶⁰ The interpretation condition rises to the status of a reservation depending on whether it is a “mere interpretative declaration” or a “qualified interpretative declaration”. McRae explains the difference as follows:⁴⁶¹

The legal effect of an interpretative declaration depends initially upon whether the declarant seeks only to offer an interpretation of the treaty that may be found subsequently to be incorrect (a “mere interpretative declaration”), or whether the declarant purports to make its acceptance of the provision in question conditional upon acquiescence in that interpretation (a “qualified interpretative declaration”)... [Qualified interpretative declaration], on the other hand, must be assimilated to a reservation, for by asserting that its interpretation overrides any contrary interpretation the declarant has purported to exclude or modify the terms of the treaty.

As the European Court of Human Rights remarked in *Belilos*, much hinges on the original intention of the declarant.⁴⁶² That is, the declarant’s intention determines whether an interpretative declaration amounts to a “qualified” one, hence a reservation, or whether it is a mere declaration of preferred interpretation.

When the full application of a treaty requires that all parties to the treaty consent to it, a reservation made by one party must be approved and permitted by all the other parties.⁴⁶³ Second, some treaties expressly clarify their position towards reservation because

⁴⁶⁰ To read on the validity of reservations see Italy, Court of Cassation (Joint Sessions), 21 October 1977, *Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies v. Jasbeç*, 71 ILR 60S.

⁴⁶¹ D.M. McRae, ‘Legal Effect of Interpretative Declarations,’ (1978) 49 British Yearbook of International Law 155, 172-173.

⁴⁶² *Belilos v Switzerland*, E. Ct. H.R., Series A, Vol. 132; 10 EHRR 433. Judgment of 20 April 1988, paragraph 48.

⁴⁶³ United Nations, *Treaty Handbook* (United Nations 2012) 12. See also Guideline 1.3, which lays down that the criterion for distinguishing between mere interpretative declaration and reservations as determined by the “legal effect that its author purports to produce”.

they want to avoid any confusion regarding reservations to those treaties.⁴⁶⁴

Article 19 of the Vienna Convention provides for three types of exceptions to the general liberty to formulate a reservation. The first exception is reservations expressly prohibited by a treaty.⁴⁶⁵ The second type of exceptions relates to situations where a treaty provides that only specified reservations, which do not include the reservation in question, may be made.⁴⁶⁶ Thirdly, reservations that are contrary to the object and purpose of a treaty.⁴⁶⁷

In some cases, treaties specifically prohibit reservations. For example, Article 120 of the Rome Statute of the ICC provides that “no reservations may be made to this Statute”. Similarly, reservations are prohibited in many environmental treaties, for example, Article 37 of the 1992 Convention on Biological Diversity and Article 37 of the 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa. Other treaties permit certain reservations or are silent about reservations.⁴⁶⁸ The European Convention on Human Rights is a treaty that only accepts certain types of reservations, namely reservations when provisions of domestic law conflict the Convention.⁴⁶⁹

There are two approaches to reservations that contradict the object and purpose of a treaty. One approach is to hold that a reservation that violates the object and purpose of a treaty is invalid in itself. The other approach is to hold that such a reservation is valid unless any or all of the other parties to the treaty oppose such reservation.

Reservations to treaties were considered in the 2006 case between the Democratic Republic of the Congo v Rwanda before the

⁴⁶⁴ R. R. Foulke, “Treaties” (1918) 18, 5, Columbia Law Review Association, Inc. 436. in Hall, *International Law* (6th ed 1909). “It is now the practice to make an express reservation of the ratification either in the full powers given the negotiators or in the itself.”

⁴⁶⁵ Article 19(a) of the Vienna Convention on the Law of Treaties, 1969.

⁴⁶⁶ *ibid* Article 19(b).

⁴⁶⁷ *ibid* Article 19(c).

⁴⁶⁸ The Treaty Section of the Office of Legal Affairs, *Treaty Handbook*, (United Nations Publication 2012) 12.

⁴⁶⁹ Article 64(1) of the European Convention on Human Rights, 1950.

International Court of Justice.⁴⁷⁰ On the basis of acts of aggression by Rwanda on the DRC's territory, the DRC brought suit against Rwanda before the ICJ and alleged genocide in breach of the Genocide Convention, which both parties ratified. Rwanda had made a reservation to Article 9, which provides for the compulsory jurisdiction of the ICJ in disputes about the Genocide Convention. The DRC submitted that Rwanda's reservation was invalid because it prevented the ICJ from deciding a breach of a *jus cogens* norm. The ICJ rejected the DRC's argument and ruled that the mere fact that obligations *erga omnes* and *jus cogens* norms were at issue in a dispute does not mean that the ICJ had jurisdiction to hear and determine that dispute.⁴⁷¹

A reservation must be contrasted from an 'understanding' and a 'declaration'.⁴⁷² An understanding or a declaration is a unilateral statement by a state on how it understands or interprets a certain provision or provisions of a treaty.⁴⁷³ Such statement does not seek to alter the legal effect of those provisions; neither does it seek the acceptance of such interpretation by other states. These statements are useful for states in the sense that their domestic courts and administrative agencies will consider such official interpretation of the provisions of a treaty, even though the interpretation may carry no weight on the international plane.⁴⁷⁴ In some states, courts consider themselves bound by such official interpretations of treaties.

9. Termination⁴⁷⁵ and amendments

Termination of a treaty or a withdrawal of a party from a treaty may take place in conformity with the provisions with the treaty in question or at any time by consent of all the parties to the treaty.⁴⁷⁶ A state may terminate a treaty in the following circumstances:

⁴⁷⁰ *Armed Activities (New Application: 2002) Case (Democratic Republic of the Congo v Rwanda)*, I.C.J. Reports 2006, 6.

⁴⁷¹ *ibid* paragraphs 64-65.

⁴⁷² United Nations, *Treaty Handbook* (United Nations 2012) 12.

⁴⁷³ O'Brien *op cit* 337.

⁴⁷⁴ See D.M. McRae, 'Legal Effect of Interpretative Declarations' (1978) 49 *British Yearbook of International Law* 155, 172-173.

⁴⁷⁵ O'Brien *op cit* 350 – 355.

⁴⁷⁶ Article 54 of the Vienna Convention.

1. The terms of the treaty provide for the termination of the treaty or the parties consent to the termination of the treaty,⁴⁷⁷
2. the parties conclude another treaty on the same subject matter,⁴⁷⁸
3. there is a material breach of the terms of the treaty,⁴⁷⁹
4. some circumstances have made it impossible for the parties to perform the treaty,⁴⁸⁰ or
5. there is a fundamental change of circumstances.⁴⁸¹

Withdrawing from a treaty is not the same as terminating it or suspending its operation. Withdrawal, technically known as denunciation, is provided for in Article 56 of the Vienna Convention. The declarations by Namibia that it will pull out of the Rome Statute establishing the International Criminal Court put the possibility of the termination of a treaty in the front row, on the headlines.

A state may not terminate a treaty unless the treaty provides for its own suspension and termination.⁴⁸² A good example of how a state can terminate a treaty in terms of the treaty's own provision is the recent decisions by Namibia, South Africa, Burundi and the Gambia to pull out of the Rome Statute establishing the International Criminal Court.⁴⁸³ Article 127 of the Rome Statute establishing the International Criminal Court provides for a state's withdrawal from the Rome Statute. Despite their threats, those African states have not yet pulled out of the ICC.

A material breach of a treaty by one party entitles the other party to terminate the treaty. The International Court of Justice in the 1971 *Namibia* case held:⁴⁸⁴

⁴⁷⁷ *ibid.*

⁴⁷⁸ *ibid* Article 59.

⁴⁷⁹ *ibid* Article 60.

⁴⁸⁰ *ibid* Article 61.

⁴⁸¹ *ibid* Article 62.

⁴⁸² Dugard *op cit* 423.

⁴⁸³ For more on this see N. Bohler-Muller and D. P. Zongwe, (2016) 'It Is Self-Defeating for Africa (and South Africa) to Withdraw From the International Criminal Court' *Africa Insight*.

⁴⁸⁴ ICJ Reports (1971), 16 at 17.

The rules laid down by the Vienna Convention... concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law.

A rule of customary international law enables a state to terminate a treaty when there is a fundamental change in the circumstances that led the state to ratify the treaty.⁴⁸⁵ This rule implies that, even if a state has not ratified the Vienna Convention, it is nonetheless bound by the rule as this is a rule of customary international law. Similarly, if a treaty does not provide for its own termination, the rules of international custom that apply to termination of treaties will necessarily form part of that treaty's provisions. Besides, the Vienna Convention does not say if a treaty can be terminated in the case of armed conflict. The question is whether armed conflict qualifies as a fundamental change in circumstances warranting termination of a treaty.

With reference to multilateral treaties, the Vienna Convention distinguishes between amendment and modification.⁴⁸⁶ An amendment alters the legal effect of the term of a treaty whereas a modification alters the effect of a treaty only with regard to certain states parties.⁴⁸⁷

10. Succession to treaties

The succession to treaties is not covered by the 1969 Vienna Convention on the Law of Treaties, but by the 1978 Vienna Convention on Succession of States in respect of Treaties.⁴⁸⁸ A change of government does not affect or alter the obligations of a state under the treaties it ratified.⁴⁸⁹ Different rules apply when one part of the country becomes independent. When Namibia achieved independence from South Africa on 21 March 1990, it ceased to be

⁴⁸⁵ Article 62 of the Vienna Convention.

⁴⁸⁶ O'Brien op cit 349 -350.

⁴⁸⁷ Articles 39-41 of the Vienna Convention.

⁴⁸⁸ Vienna Convention on Succession of States in respect of Treaties (1978) 1946 U.N.T.S. 3.

⁴⁸⁹ Dugard op cit 427.

a part of South Africa and became an independent state. Article 143 of the Namibian Constitution settles the question of state succession as follows:

All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2) (d) hereof otherwise decides.

The Namibian position on state succession to treaties mirrors the stance embraced in Southern African in general. The practice in Southern Africa has been to succeed to the obligations created by treaties signed by the state occupying or colonizing the newly independent state. The Supreme Court of Namibia also tackled the question of state succession to international treaties in *Cultura 2000*.⁴⁹⁰

State succession to treaties in the case of Namibia differs from the situation whereby a state that belonged to a regional economic community decides to break away from that community. The most popular example is England's Brexit. Brexit also raises fundamental questions of succession to treaties.⁴⁹¹

⁴⁹⁰ Government of the Republic of *Namibia* & Another v. *Cultura 2000* & Another 1993 NR 328 (SC).

⁴⁹¹ For more on this see G. Van der Loo and S. Blockmans, *The Impact of Brexit on the EU's International Agreements* (2016) Retrieved from <https://www.ceps.eu/publications/impact-brexit-eu%E2%80%99s-international-agreements>. Accessed on 11/03/2017.

STATES AND NAMIBIA'S LONG MARCH TO STATEHOOD

Even before international law provided Namibia with both its 'birth certificate' and its name, Namibia had a long history with the international law or the 'law of nations', as it was known in its heydays. In this long march towards statehood, the national liberation movement made use of international law.⁴⁹² The fight for independence did not only take place in the trenches, it also unfolded on the international scene where diplomacy and international law were deployed for Namibia to eventually achieve statehood.⁴⁹³ Indeed, the long march to Namibia's eventual independence can be seen as a victory of diplomacy – a diplomacy that fully deployed the values and rules of international law. Namibia's independence from South Africa on March 21st, 1990, could be seen as the culmination of a successful diplomacy where the rules of international law were used as weapons as much as the AK 47 on the ground.

This chapter is an essential building block in my argument that Namibia, despite its small population size and its relatively limited relevance in world affairs, contributed much to international law and that international law gave – and still gives – a great deal to Namibia. From the formal declaration of South West Africa as a German protectorate to the country's Independence, Namibia had an umbilical relationship with international law. For Melber, Namibia is the United Nations' "ultimate success story".⁴⁹⁴

The question of statehood cannot be overstated. The self-determination of South West Africa is intimately linked to the achievement of that international status. Tellingly, the fact that South West Africa/Namibia was not a state until 1990 meant that Namibians could not approach the International Court of Justice or any other international court. This greatly hampered the liberation

⁴⁹² C. Theodoropoulos, 'Support for SWAPO's War of Liberation in International Law' (1979) 26, 2 Africa Today 39–48.

⁴⁹³ *ibid.*

⁴⁹⁴ H. Melber, *Understanding Namibia: The Trials of Independence* (Jacana Media) 162.

struggle. Since the people of South West Africa could not approach the Court in its own name, Liberia and Ethiopia brought a case before the Court to complain about South Africa's treatment of Namibians. However, not being directly affected by the alleged treatment of Namibians, the Court decided in a controversial and split judgment that Liberia and Ethiopia did not have standing to file that claim on behalf of South West Africa/Namibia. The bottom line is that, until and unless a political entity acquires statehood, it cannot enjoy the rights, privileges and obligations conferred on states under international law.

In this chapter, I present and discuss the criteria for statehood. In particular, I highlight Namibia's long struggle for self-determination, independence and recognition as an independent state.⁴⁹⁵ I also broach the thorny question of self-determination as it pertains to secession and internal autonomy.

1. Basic distinctions

1.1 Actors versus subjects

There is a traditional distinction between actors and subjects of international law.⁴⁹⁶ Actors are any person or organization that plays a role on the international stage whereas subjects are actors that have rights and obligations under international law.⁴⁹⁷ The current trend is that a growing number of actors on both the national and international stages are becoming subjects of international law. I have already addressed the question of the multiplicity of actors in Chapter 2 when discussing the changing nature of international law. Nonetheless, states are historically the first subjects of international

⁴⁹⁵ M. Wiebers, *Namibia's Long Walk to Freedom*, The Role of Constitution Making in the Creation of an Independent Namibia, 81. Retrieved from www.usip.org/sites/default/Framing%20the%20State/Chapter4.Framing. Accessed on 08/04/2017.

⁴⁹⁶ J. d'Aspremont, A. Nollkaemper, I. Plakokefalos, *et al.* 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62, 1 *Netherlands International Law Review* 49-67. Available <<https://link.springer.com/article/10.1007/s40802-015-0015-0>> Last accessed 27 March 2017.

⁴⁹⁷ E. T. Jouannet, *A Short Introduction to International Law* (Cambridge University Press 2014) 36.

law.⁴⁹⁸ And, despite the multiplicity of new subjects, states remain the primary subjects of international law.

As an actor on the international scene, the state has become relatively weak in the face of competition from other actors. This relative weakness is exacerbated by globalization. The state has lost some measure of its influence with regard to its legal power and the power to resolve disputes.⁴⁹⁹ This is notably because of the rise of multinational corporations, some of which possess war chests bigger than the economies of entire nations. Kate O'Regan, Acting Judge of the Supreme Court of Namibia, remarked in the *Wal-Mart* case that Wal-Mart, the US retail giant, is “apparently the world’s largest company, in terms of revenue, with annual revenue estimated at US\$408 billion, larger than the gross domestic product of most of the countries in the world.”⁵⁰⁰ (As of 2017, the gross domestic product [i.e., the economic size] of Namibia is estimated at U\$13.245 billion,⁵⁰¹ which is almost 30 times smaller than the size of Wal-Mart as quoted by O'Regan)

1.2 State versus government

Furthermore, there is a distinction between state and government. Although the two tend to be used interchangeably, they are technically different. The ‘state’ is the *permanent* political entity that represents a certain territory and a certain people whereas ‘government’ is the *temporary* political organization that represents the people within a state at a certain time, usually as a result of elections. Plus, the notion of a state subsumes a government because the presence of an effective government is – as I show below – one of the requirements for statehood. I provide a more comprehensive understanding of a state later in this chapter as I go through the traditional criteria for statehood in international law.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid 37.

⁵⁰⁰ *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated* (SA 41-2011) [2011] NASC 11 (4 November 2011) paragraph 2.

⁵⁰¹ World Bank, ‘Namibia: Data,’ Available at <<https://data.worldbank.org/country/namibia>> Last accessed 26 October 2018.

2. The emergence of the modern state

From the outset, you must bear in mind that the ‘state’ in the sense of politically organised community existed in Africa long before colonisation. The thick conception of the state must therefore be kept separate and distinct from the *modern* concept of the state, which is the object of this chapter.

The concept of the modern state initially emerged in Europe in the 16th century following the Treaty of Westphalia.⁵⁰² As I explain in Chapter 3 (on the history of international law), the modern state, like international law itself, has origins in European Christian civilization. Since then, the number of states has dramatically increased from about 51 when the United Nations was created in 1945 to more than 190 states today.⁵⁰³

Vidmar observes that the two fundamental problems in the international law relating to statehood are the inadequacies of the statehood criteria and the flaws of the two traditional recognition theories (i.e., declarative and constitutive theories).⁵⁰⁴ I speak to the criteria for statehood in this chapter and the recognition theories in the next chapter. Vidmar basically argues that the statehood criteria and the recognition theories do not explain the inconsistencies in the international law on statehood.⁵⁰⁵ Thus, they cannot explain why Namibia is recognised as a state while Western Sahara is not. As I show later in this chapter and the next one, the recognition of a state into the international community of nations is largely a political decision, that is, a decision that takes political considerations into account.⁵⁰⁶ But while other factors – political or otherwise – may be considered in recognizing an entity as a state, the crucial factor appears to be one or another form of territorial effectiveness.⁵⁰⁷

⁵⁰² P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, Routledge Publishers 1997) 9.

⁵⁰³ *ibid.*

⁵⁰⁴ J. Vidmar, ‘Territorial Integrity and the Law of Statehood’ (2012) 44 *George Washington International Law Review* 697.

⁵⁰⁵ *ibid.*

⁵⁰⁶ J. Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 3-4.

⁵⁰⁷ See M. Shaw, *International Law* (6th edn, Cambridge University Press) 178.

Furthermore, the relationship between factual and legal criteria for statehood is not stable. Whether the birth of a state is primarily a question of law of fact or law is a particularly complex and significant question in international law. One of the most common arguments is that of the declaratory theory, which states that statehood is a legal status independent of recognition and that the legality of state existence should be an abstract issue: the law must take into account the new circumstances regardless of their illegality.⁵⁰⁸ That said, the recognition of a state also gives a lot of weight to factual criteria.

3. Namibia's long march towards independence

Political communities existed in the territory regarded today as Namibia.⁵⁰⁹ Traditional communities within the different ethnic groups such as the Ovambos and the Hereros predated the colonization of Namaqualand.⁵¹⁰ The history of Namibia did not start with the 1884 Berlin Conference and the colonization of South West Africa/Namibia. There are different ways of looking at the history of Namibia. This historical background looks at that history only insofar as it pertains to international law and how it served Namibia's statehood.

International law played a central role in Namibia's long struggle for independence and statehood. A few years after the 'creation' of Namibia as a German protectorate in 1885 following the Berlin Conference and the Berlin Act, South African forces invaded South West Africa in 1915. At the end of World War I, Germany was defeated, and the League of Nations entrusted South Africa with the administration of South West Africa on behalf of the British Crown.⁵¹¹ Thus, South Africa was the mandatory in terms of the Mandate of South West Africa, which became a mandate territory.

The status of the territory of South West Africa changed over time. The territory became recognized internationally first as a

⁵⁰⁸ *ibid* 177.

⁵⁰⁹ See K. Mburumba, 'Independence in Namibia – An Urgent Reality' (1977) 46 *Journal of Negro Education* 197-201.

⁵¹⁰ 'Namaqualand' is the name of the territory roughly associated with present-day Namibia.

⁵¹¹ Articles 1 and 2 of the Mandate for South West Africa, 1919.

protectorate, then as a mandate, and eventually as a state. A protectorate is founded on an international treaty between an administrating nation and a protected nation.⁵¹² The mandate system of the League of Nations succeeded colonial protectorates. It improved on the protectorates model.⁵¹³ A mandate differs from a protectorate in that it establishes a mission that the mandatory must carry out under the supervision and control of the international community, as opposed to an individual administrating nation.⁵¹⁴ The mandate system was replaced by trusteeship under the United Nations (UN).

However, I must point out here that South Africa never surrendered Namibia to that trusteeship.⁵¹⁵ South Africa refused to place Namibia under that UN trusteeship. This refusal opens up questions concerning the exact status of Namibia between the time the UN revoked South Africa's mandate over Namibia in 1966 and the time Namibia achieved independence and statehood in 1990.

By Resolution 2145, the UN General Assembly revoked South Africa's mandate over South West Africa and put South West Africa under the direct responsibility of the UN.⁵¹⁶ Was Namibia/South West Africa then still a mandate or was it a stateless territory without a distinct and internationally recognized legal personality, almost like the Palestinian territories today? In a special session in 1967, the UN General Assembly established the Council for South West Africa,⁵¹⁷ which it later renamed the 'Council for Namibia', to administer the 'territory' until independence. The Council for Namibia acted on Namibia's behalf internationally, for example, by entering into treaties such as the 1982 UN Convention on the Law of Treaties. Still, does this UN agency on Namibia's behalf imply that the territory of Namibia had achieved international legal personality?

⁵¹² G. Gozzi, 'History of International Law and Western Civilization' (2007) 9 *International Community Law Review* 367.

⁵¹³ *ibid.*

⁵¹⁴ *ibid.*

⁵¹⁵ *Namibia Case [Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)]*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, 16.

⁵¹⁶ G.A. Res. 2145 (XXI), U.N. Doc. A/RES/2145 (XXI) (27 October 1966).

⁵¹⁷ G.A. Res. 2248 (XXI), U.N. Doc. A/RES/2248 (XXI) (19 May 1967).

Be that as it may, Humphreys characterised this evolution in institutions of governance from the protectorates to states in Africa as “laboratories of statehood”.⁵¹⁸ He argues that from 1885 to date the legal frame of states in Africa were defined through colonial activities.⁵¹⁹

3.1 From the German protectorate to the South African apartheid administration

The history of international law in pre-Independence Namibia consisted mainly in efforts to get the recognition of South West Africa as an independent state. Germany declared South West Africa as its protectorate in 1884.⁵²⁰ In 1904-1907,⁵²¹ German troops carried out genocide of approximately 110,000 people: about 100,000 Herero and 10,000 Nama people. In 1915, in the midst of World War I, South Africa invaded the German protectorate of South West Africa.

In 1920, at the end of the World War I, which saw the defeat of German troops, the League of Nations entrusted the administration of South West Africa to South Africa, as a C class mandate territory. South Africa was to administer the territory on behalf of the British Crown.⁵²² In entrusting South Africa with the administration of South West Africa on behalf of the British Crown, the thinking was at the time that the people of South West Africa were not yet capable of administering themselves. This thinking not only reflects the Eurocentric aspects of international law, but also its early racism and paternalism. In similar vein, a ‘class C mandate’ in the mandate system of the League of Nations meant that the mandatory nation had to extend its legal system to the nation it was entrusted to administer. Thus, South Africa applied its legal system to South West Africa/Namibia.

⁵¹⁸ S. Humphreys, ‘Laboratories of Statehood: Legal Intervention in Colonial Africa and Today’ (2012) 75 *Modern Law Review* 475.

⁵¹⁹ *ibid.*

⁵²⁰ J. Faunderz, *The Relevance of International Law* (1986) 8, 2 *Third World Quarterly* (Taylor & Francis) 541. Retrieved from <http://www.jstor.org/stable/3992177>. Accessed on 13/02/2017.

⁵²¹ Some historical sources point to the year 1908 as marking the end of that war, but most refer to the year 1907 as marking the end of the war.

⁵²² Articles 1 and 2 of the Mandate for South West Africa, 1919.

3.2 From apartheid to Independence and statehood

Efforts to attain independence by the Namibian liberation movement can be illustrated through the South West Africa cases. After World War II ended in 1945, the Union of South Africa maintained that the Mandate for South West Africa had lapsed following the demise of the League of Nations. Accordingly, South Africa wanted the United Nations to recognize its (i.e., South Africa's) intention to integrate South West Africa into South Africa.

The United Nations refused to consent to South Africa's integration of South West Africa and, instead, invited South Africa to place South West Africa under UN trusteeship in terms of Chapter XII of the UN Charter. In 1948, the South African government introduced apartheid in both South Africa and South West Africa/Namibia.

The following year, the South African government refused to report to the United Nations, which succeeded to the League of Nations, dissolved at the end of World War II. South Africa contended that it only owed an obligation to report to the League of Nations, not to the United Nations. South Africa's argued that, since the League had ceased to exist, its (i.e., South Africa's) obligations under Article 22 of the Covenant of the League of Nations had fallen away as well.⁵²³ (By way of reminder, Article 22 of the Covenant provided for the administration of mandate territories.

The ICJ rejected South Africa's submission on the basis that the League of Nations, in its resolution of April 18th, 1946, stated that the League's functions with regard to mandated territory would come to an end, but that Chapter XII (on UN trusteeship) corresponded to principles embodied in Article 22 of the Covenant of the League of Nations.⁵²⁴ The League also noted the intentions of the mandatory states to continue to administer the mandate territories in line with their obligations in terms of their respective mandates. The Court reasoned that, although the League acknowledged that its functions with respect to mandate territories would lapse, the League did not say that the mandates themselves would lapse.⁵²⁵ The ICJ inferred

⁵²³ *International Status of South West Africa, Advisory Opinion*, 1950 I.C.J. 128 (July 11) 132-133.

⁵²⁴ *ibid* 137-138.

⁵²⁵ *ibid* 134.

from these facts that the League's resolution of 1946 transferred the supervisory powers of mandatory states to the United Nations.⁵²⁶

On the international plane, the struggle continued before the International Court of Justice (ICJ). The ICJ handed down six advisory opinions and two decisions. In 1950, the ICJ issued an advisory opinion in which it contradicted South Africa's argument that it only owed an obligation to report to the League of Nations. The I.C.J. opinion was authoritative and highly symbolic of the international community's stance on the situation in Namibia, but it was not binding because advisory opinions serve as advices on the legal position rather than binding judicial pronouncements on that position.

The ICJ later issued two advisory opinions. In 1955, the ICJ issued one advisory opinion, which clarified the *Voting Procedure*⁵²⁷ to be followed by the General Assembly when addressing matters relating to the supervision of the mandate over Namibia. One year later, the ICJ wrote another advisory opinion, which dealt with the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*.

In 1960, out of solidarity with the Namibian people, the Empire of Ethiopia and the Republic of Liberia commenced legal action before the ICJ against South Africa's administration of South West Africa.⁵²⁸ In their capacities as former members of the League of Nations, Ethiopia and Liberia sought a finding by the ICJ that the mandate given to South Africa to administer South West Africa was still valid, that South Africa was legally bound to report to the United Nations over its administration of South West Africa, and that the introduction of apartheid in Namibia violated the mandate given to South Africa.⁵²⁹ In 1962, South Africa raised an objection to Ethiopia and Liberia's claim on the basis that the two countries lacked interest in the matter.

⁵²⁶ *ibid* 137.

⁵²⁷ 1955 I.C.J. Reports 67.

⁵²⁸ International Court of Justice, Proceedings joined with South West Africa (*Ethiopia v. South Africa*) on 20 May 1961. Retrieved from <http://www.icj-cij.org/docket/index.php?sum=288&code=lsa&p1=3&p2=3&case=47&k=f2&p3=5>. Accessed on 17/02/2017. See also A. D'Amato, 'International Law and Political Reality' (1995) 1 Kluwer Law International) 373.

⁵²⁹ *South West Africa, Second Phase*, I.C.J. Reports 1966, 6.

Although the ICJ dismissed South Africa's preliminary objection,⁵³⁰ four years later (i.e., in 1966) the ICJ nonetheless ruled that Ethiopia and Liberia lacked standing because they were not directly affected by South Africa's administration of South West Africa. The ICJ went back on its earlier decision and refused to hear the claim by Ethiopia and Liberia on the merits on the ground that the two countries did not have a legal right or interest in the subject-matter of their claim.⁵³¹ The I.C.J. held that individual members of the League were not parties to the various instruments of mandate.⁵³²

As I show in Chapter 10, this controversial decision would eventually lead to a change of the law on state responsibility. This is one major example of Namibia's contribution to the development of the rules of international law.

The 1966 ICJ's decision was a loss for Namibia's liberation movement, but that loss was short-lived as in the same year the General Assembly resolved to revoke South Africa's mandate over South Africa. Through Resolution 2145, the UN General Assembly decided that

the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that hence South West Africa comes under the direct responsibility of the United Nations.⁵³³

On June 12th, 1968, the General Assembly changed the name of the territory from 'South West Africa' to 'Namibia'.⁵³⁴

In 1970, the liberation movement recorded another major victory and South Africa, another major defeat, when the United Nations –

⁵³⁰ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962*, I.C. J. Report; 1962, 319.

⁵³¹ *South West Africa, Second Phase*, I.C.J. Reports 1966, 6 and 34.

⁵³² *ibid* 28-29.

⁵³³ G.A. Res. 2145 (XXI), U.N. Doc. A/RES/2145 (XXI) (27 October 1966) [4].

⁵³⁴ G.A. Res. 2372 (XXII), U.N. Doc. A/RES/2372 (XXII) (12 June 1968). In that resolution, the General Assembly of the United Nations decided to rename the Council for South West Africa as the "Council for Namibia" and started referring to South West Africa as "Namibia".

this time around the Security Council – stated in Resolution 276 that South Africa’s occupation of Namibia was illegal.⁵³⁵ This victory for Namibia was strengthened one year afterwards by an advisory opinion by the ICJ that ruled that South Africa’s continued occupation of Namibia was illegal and a violation of international law.⁵³⁶ It further stated that South Africa should withdraw from Namibia immediately.⁵³⁷

In 1978, the Security Council passed Resolution 435, which contained an independence plan for Namibia and paved the way for Namibia’s independence and statehood. The Resolution established the United Nations Transition Assistance Group (UNTAG) for the purposes of transition and independence in Namibia.

However, the liberation struggle had been frustrated by the hesitations of Western countries during the Cold War such that Namibia had to wait almost a decade before the United Nations Transition Assistance Group (UNTAG) could arrive in Namibia, and organize and supervise the transition and electoral processes in Namibia. Resolution 435 establishing UNTAG was adopted in 1978, but it is only in 1989 that UNTAG finally arrived in Namibia. The deployment of UNTAG was caught up by Cold War politics as Western powers were concerned about the communist rhetoric adopted by SWAPO and members of the liberation struggle, and about the support that they received from communist countries, such as Angola, Cuba and Russia. A number of key Western powers, which propounded capitalism, took an active role in drafting the 1982 Constitutional Principles. These Principles formed the basic architecture of the Namibian Constitution and were liberal in orientation, a far cry from the communist philosophy.⁵³⁸

⁵³⁵ C. Saunders, (2009) 35, 2 ‘Liberation Struggles, Exile and International Solidarity, British Support for Namibian Independence’ *Journal of Southern African Studies* (Taylor & Francis, Ltd) 437 – 454. Retrieved from <http://www.jstor.org/stable/40283241>. Accessed on 13/02/2017.

⁵³⁶ *Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council 276 (1970)*, 1971 ICJ Reports 16.

⁵³⁷ *ibid.*

⁵³⁸ In mid-1999 report of the Southern African Development Community entitled *Governance and Human Development in Southern Africa* ranked Namibia as the most democratic of seven countries evaluated in the region. Namibia was seen as more democratic than Botswana or South Africa, *The Namibia* (13 July 1999) found in G. Bauer, ‘Namibia in the First Decade of Independence: How Democratic?’

Thus, it is only in 1989 that free and fair elections were held under the supervision of the United Nations, specifically UNTAG. That year also marks a historic milestone as it is during that time that the Berlin Wall fell and the USSR disintegrated – watershed moments symbolizing the end and collapse of communism. And, on the fateful day of March 21st, 1990, Namibia gained its independence from South Africa and became a state... at long last.

4. The criteria for statehood

Namibia achieved statehood in 1990. Although it gained its formal political independence from South Africa on March 21st, 1990, the UN officially admitted Namibia as a member one month later, on April 23rd, 1990. The Security Council recommended Namibia to the General Assembly for admission to the UN on April 17th, 1990.⁵³⁹ Then, during the very first plenary meeting of its special session, the Assembly admitted Namibia as a member by resolution on April 23rd, 1990.⁵⁴⁰

The General Assembly,

Having received the recommendation of the Security Council of 17 April 1990 that the Republic of Namibia should be admitted to membership in the United Nations,

Having considered the application for membership of the Republic of Namibia,

Decides to admit the Republic of Namibia to membership in the United Nations.

Resolution of 23 April 1990 can therefore be regarded as Namibia's 'birth certificate'.

(2001) 27, 1 Journal of Southern African Studies, (Taylor & Francis, Ltd.) 33-55 (Namibia has been routinely cited as one of Africa's most successful new constitutional democracies). Retrieved from <http://www.jstor.org/stable/823289> accessed on 13-02-2017 19:53 UTC.

⁵³⁹ S.C. Res. 652, U.N. Doc. S/RES/652 (17 April 1990).

⁵⁴⁰ G.A. Res. S-18/1, U.N. Doc. A/RES/S-18/1 (23 April 1990).

The 1933 Montevideo Convention on the Rights and Duties of States spells out the traditional criteria for statehood. Article 1 of the Convention reads:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.

These criteria continue to be regarded as the essential elements of statehood. They are generally accepted as reflecting the requirements for statehood at customary international law.⁵⁴¹ They have become the very definition of the state.⁵⁴² Thus, if asked what makes Namibia a state, you should spontaneously reply that Namibia's internationally recognised territory, a government in effective control of its territory, a permanent population, and its capacity to enter into economic relations with states.

Today, there are about 194 states lying on earth. The UN has 193 members.⁵⁴³ The latest, 193rd state to join the UN is South Sudan. It became a member on 14 July 2011.⁵⁴⁴ The Vatican City is the only entity that the international community recognizes as a state but that is not a member of the UN.

In the following sections, I present those criteria in turn. But before I proceed to present the four factual criteria for statehood, it must be noted that what is defined as a 'state' under international law is not necessarily the same as the definition of 'state' under municipal law. Thus, in the United States, Nigeria, Australia, and Mexico, a 'state' refers to a subdivision of the sovereign nation-state. The four factual criteria set out in the Montevideo Convention, especially the capacity to enter into relations with states, do not apply to those subdivisions of sovereign states, although under municipal law those subdivisions may be granted certain rights and duties.⁵⁴⁵ International

⁵⁴¹ D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 92.

⁵⁴² M. Shaw op cit 178.

⁵⁴³ United Nations, 'Member States,' Available at <<http://www.un.org/en/member-states/#gotoD>> Last accessed 27 October 2018.

⁵⁴⁴ *ibid.*

⁵⁴⁵ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen Publishers 2003) 192-193.

law still treats national states – and not its subdivisions – as primary subjects and primary holder of rights and duties, notably the right to enter into relations with other states. Therefore, those subdivisions generally lack the capacity to enter into diplomatic or foreign relations with nation-states,⁵⁴⁶ although this is less the case nowadays.

4.1 Permanent population

This criterion is meant to be used together with the territory requirement and connotes a stable community.⁵⁴⁷ There is no minimum requirement for the size of the population. It is therefore conceivable to have a two-person state. As a matter of fact, many countries have small populations. Seychelles has an entire population of 80,000, which is less than the population of Windhoek. With a vast geographical area and a population of two million people, Namibia is a country with one of the world's lowest density.⁵⁴⁸ The entire population of Namibia is smaller than the population of the city of Montreal in Canada. This low density and the country's relatively small population can never constitute a ground in international law for calling into question the statehood of Namibia.

4.2 Defined territory

For a political community to qualify as a state, it needs to have a defined territory.⁵⁴⁹ The requirement of a 'defined territory' does not imply that borders must be fully settled or undisputed as long as there is a consistent band of territory effectively controlled by the alleged state.⁵⁵⁰ Israel was admitted to membership of the United Nations in

⁵⁴⁶ T. Buergenthal and S.D. Murphy, *Public International Law in a Nutshell* (5th edn, St. Paul, Minnesota, West 2013) 2.

⁵⁴⁷ I. Brownlie, *Principles of Public International Law* (6th ed, Oxford) 70.

⁵⁴⁸ <http://www.worldatlas.com/articles/the-10-least-densely-populated-places-in-the-world-2015.html>. Accessed on 07/04/2017.

⁵⁴⁹ W. Abdulrahim, *A State as a Subject of International Law*. The existence of a particular territory over which a political authority operates is essential for the existence of a State. The size of the territory of a State and alterations to its extent, whether by increase or decrease, do not of themselves change the identity of that State.

A State continues to exist as long as a portion of land is retained. Retrieved from <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/5-a-state-as-a-subject-of-international-law>. Accessed on 08/04/2017.

⁵⁵⁰ M. Shaw op cit 71.

1948, which is limited to states in terms of Article 4 of the United Nations Charter, despite the fact that its borders were disputed. Namibia achieved independence on 21 March 1990, though some of its borders were in dispute, for instance, Walvis Bay and the Penguin Islands.

What is required is that the entity wishing to become a state have a stable political community located in a geographical area that can be readily ascertained and over which a government exercises control.⁵⁵¹ It is not a requirement that the community lives on a single territory. The Angolan territory of Cabinda is an enclave within the territory of the Democratic Republic of the Congo. Likewise, Lesotho is a state within another state, that is, South Africa. And the territory of Canada separates Alaska from the rest of the United States' territory.

4.3 Effective government

It is a requirement that a territory be in effective control of a government before an entity can be regarded as a state. Here, the emphasis is on the effective control by a government over a territory to the exclusion of other entities or states. Effective control provides the best evidence of a stable political community.⁵⁵² The level of control required before an entity is deemed to be a state depends on the circumstances. If a new state is created with the consent of the former sovereign, then a lower level of control by the new state will be tolerated.⁵⁵³

In practice, this criterion has not been consistently observed. For instance, some states were admitted to membership of the United Nations at a time when they were not well organized, as demonstrated by developments in Burundi and Rwanda around 1962. Shaw⁵⁵⁴ observes that effective government is not really a condition for statehood, but more an indication of some sort of coherent political structure and society.⁵⁵⁵ When South Sudan acceded to Independence, that is, seceded from the rest of Sudan, the

⁵⁵¹ Abdulrahim op cit.

⁵⁵² Brownlie op cit 71.

⁵⁵³ J. Crawford, *The Creation of States in International Law* (1979) 44-45.

⁵⁵⁴ M. Shaw op cit 180.

⁵⁵⁵ ibid.

government of South Sudan was not in effective control of its entire territory. The same happened with the recognition of Croatia and Bosnia-Herzegovina by the European Community in the 1990s. With regard to Guinea Bissau, when the liberation movement PAIGC⁵⁵⁶ declared independence from Portugal on 24 September 1973, the country was admitted to membership of the United Nations⁵⁵⁷ even though the PAIGC admittedly controlled only between two thirds and three quarters of the territory.

The effective government requirement becomes problematic when a state descends into civil war.⁵⁵⁸ Libya offers a special example of such situation. Sometime after the fall of Muammar Gaddafi, it was estimated that 1,000 militias controlled different parts of the country. In Somalia, Somaliland controls a part of the territory and seeks recognition as an independent state while Puntland enjoys a great level of autonomy. Control over the territory was also contested in Côte d'Ivoire, DRC, and Angola because of armed conflict with rebel groups.

However, the generally accepted position is that the civil wars, the breakdown of order, illegal occupation and natural disasters do not affect the continued personality of a state as such.⁵⁵⁹ That is why the 2010 earthquake in Haiti could not possibly be said to have ended Haiti's statehood even though it may have drastically weakened the government's control over the territory. The same holds true for the so-called failed states: Civil wars and the breakdown of order could not be used to say that Côte d'Ivoire, the DRC, and Angola are no longer states at the time those countries were still at war. Nor can it be said of present-day Libya, Somalia and South Sudan.

⁵⁵⁶ The war of the PAIGC is not just on the battlefield. Great strides toward national reconstruction have been made. The nation has been shattered by 500 years of colonial contact and has been derailed from the track of history. <http://digitalcommons.ric.edu/cgi/viewcontent.cgi?article=1353&context=facultypublications>. Accessed on 27/03/2017.

⁵⁵⁷ Lobban, R, 'Guinea-Bissau: 24 September 1973 and beyond' (1974) 21, 1 Africa Today 15-24, 15. Retrieved from <http://digitalcommons.ric.edu/cgi/viewcontent.cgi?article=1353&context=facultypublications>. Accessed on 27/03/2017.

⁵⁵⁸ R. Rotberg, *When States Fail: Causes and Consequence* (Princeton University Press 2003) 5.

⁵⁵⁹ Brownlie, *Principles of Public International Law* (6th ed, Oxford) 71 and 78.

4.4 Relations with states

The requirement that an entity be capable of entering into relations with states emanates from independence. It encapsulates the overlapping notions of independence and sovereignty.⁵⁶⁰ This independence is reflected by two ‘quantitative’ tests, namely whether the state has some degree of centralization of its organs to the exclusion of other states and organizations, and whether the state has exclusive executive and legislative authority over the territory.⁵⁶¹

The fact that South West Africa/Namibia was under colonial administration meant that legally South Africa was representing South West Africa to the outside world. South West Africa/Namibia was not capable of entering into relations with states even before its formal independence. This is the case even if the liberation movement SWAPO enjoyed various levels of support in countries such as Congo-Brazzaville, Tanzania, Zimbabwe, and Cuba, to mention but a few examples.

The key notion here is *legal* authority. One state’s liberty may be limited by another, but that would not imply that the first state is not independent. Independence is affected only when one country is under the *legal* authority of another. This is the position adopted by Judge Anzilotti in separate opinion in *Austro-German Customs Union Case*.⁵⁶²

[T]he restrictions upon a State’s liberty, whether arising out of ordinary international law or contractual arrangements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.

Judge Anzilotti’s opinion, written in 1931 before the adoption of the Montevideo Convention, inspired the Convention’s meaning of a state’s ‘capacity to enter into relations with other states’.⁵⁶³ ‘Capacity

⁵⁶⁰ Shaw op cit 181 and Brownlie op cit 71 and 76.

⁵⁶¹ Brownlie op cit 71.

⁵⁶² *Austro-German Customs Union Case*, Advisory Opinion. P.C.I.J. Reports, Series A/B, No. 41, 1931.

⁵⁶³ D.J. Harris, *Cases and Materials on International Law* (4th edn, Sweet & Maxwell) 98.

to enter into relations with other states' means independence in law from the authority of any other state and thus capacity the capacity under its national law to conduct relations with other states.⁵⁶⁴

4.5 Willingness to observe international law and human rights

Some states have conditioned their recognition of an entity as state on the observance of human rights. While, in the past, recognition concentrated on effectiveness and stability, today recognition also considers the representative and democratic nature of the entity seeking recognition as states.⁵⁶⁵ This was the case for Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia.

This approach is, however, controversial. Dugard⁵⁶⁶ mentions respect for human rights as a requirement for statehood, but this is far from being generally accepted.⁵⁶⁷ In practice, this approach is confined to the political organs of the UN. Given the UN's admissions of states such as Slovenia, Croatia, and Macedonia, it is evident that many states do not look at respect for human rights and self-determination as a formal criterion for statehood.

5. Self-determination and secession

5.1 Meanings and contexts

The right to self-determination occupies a central place in international law.⁵⁶⁸ It is the embodiment of the argument that Namibia is the son of international law. Contemporary claims of self-determination include Somaliland, Western Sahara, Scotland (renewed claims with the advent of the Brexit) in the United Kingdom, Quebec and Alberta in Canada, Kosovo, Katanga in the DRC, and Zanzibar in Tanzania.

Most claims of self-determination in the form of secession do not succeed. Unsuccessful attempts to secede include Caprivi (Zambezi

⁵⁶⁴ *ibid.*

⁵⁶⁵ Shaw *op cit* 83.

⁵⁶⁶ Dugard *op cit* 87-89.

⁵⁶⁷ Brownlie *op cit* 75 and Dugard *op cit* 87-89.

⁵⁶⁸ D. Thürer and Burri, 'Self-Determination' in Max Planck Encyclopedia of Public International Law (2008). Retrieved from <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873>. Accessed on 13 April 2017.

region) in Namibia,⁵⁶⁹ Biafra in Nigeria, Lozi region of Zambia,⁵⁷⁰ Corsica in France, the Basque region in Spain, Chechnya in Russia.

The right to self-determination is provided for in the Charter of the UN (UN Charter).⁵⁷¹ It is explained in the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁵⁷² It is further provided for in the Declaration on Principles of International Law Concerning Friendly Relations;⁵⁷³ Article 1(1) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; and Article 20 of the African Charter on Human and Peoples' Rights.

In 1968, the Security Council reaffirmed the "inalienable right of the people and Territory of South West Africa to freedom and independence" in accordance with both the UN Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁵⁷⁴

The right of self-determination originates in decolonization.⁵⁷⁵ The default position is that 'peoples' within a state do not have a right to external self-determination, that is, secession; they do have the right to internal self-determination. In this context, 'people' is generally understood to refer to all the people within a state, and not a particular ethnic group. The Supreme Court of Canada in the *Quebec* case,⁵⁷⁶ which dealt with the question as to whether the province of Quebec could under international law break away from the rest of

⁵⁶⁹ *Government of The Republic of Namibia and Others v Mvulima and All Other Accused in The Caprivi Treason Trial* 2002 NR 235 (SC), 2002 NR 235.

⁵⁷⁰ J. Sabelo and B. Mhlanga, 'Bondage of Boundaries and Identity Politics in Postcolonial Africa' (2013) Africa Institute of South Africa 170.

⁵⁷¹ Articles 1 and 55 of the Charter of the United Nations, 1945.

⁵⁷² Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1414, U.N. GAOR, 1 th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

⁵⁷³ Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

⁵⁷⁴ S.C. Res. 246, U.N. Doc. S/RES/246 (14 March 1968).

⁵⁷⁵ B. Morvaridi, 'The Right to Self-determination and Individual Rights in the Era of Decolonization in Sub-Saharan Africa: The Case of UNESCO' (2011) 1, 1 History Research (David Publishing) 19. Retrieved from <http://www.davidpublishing.com/davidpublishing/upfile/2/15/2012/2012021569898321>. Accessed on 28/03/2017.

⁵⁷⁶ *Reference Re Secession of Quebec* [1998] 2 SCR 217; (1998) 37 I.L.M. 1340.

Canada, asserted that ‘people’ may refer to any portion of the population within a state.⁵⁷⁷ This appears to be the preferred exposition of the law on this point.⁵⁷⁸

Secession is not problematic where the parent state consents to it, even if it does so against its own good will. This is exactly what happened when Sudan consented to South Sudan’s secession, which took place in 2011; and when Montenegro broke away from Serbia in 2006.

Recognition plays a decisive role in the success of a secession attempt.⁵⁷⁹ At a time when secession is no longer illegal, the success or failure of a secession attempt depends on recognition by states. Some experts and states hold the view that secession outside of the context of decolonization is absolutely prohibited.⁵⁸⁰ The ICJ has recognized in *Namibia Opinion* and *Western Sahara* that the right of self-determination is a norm of international law in the context of decolonization.⁵⁸¹ However, the view that the right to self-determination only applies in the context of decolonization does not reflect state practice.⁵⁸² Self-determination applies even in contexts other than decolonization, such as those that prevailed in *Katangese Peoples’ Congress v Zaire*⁵⁸³ and *Quebec*.

Secession in violation of peremptory norms of international law has been rejected. The United Nations has condemned secessions that it said violated peremptory norms (especially the right of self-determination) in several cases, including Katanga,⁵⁸⁴ Rhodesia,⁵⁸⁵

⁵⁷⁷ *ibid* paragraph 124.

⁵⁷⁸ Dugard *op cit* 103.

⁵⁷⁹ Crawford *op cit* 374.

⁵⁸⁰ *ibid*.

⁵⁸¹ *Namibia Opinion* 1971 ICJ Reports 16, 32; *Western Sahara*, 1975 ICJ Reports 12, 31-3.

⁵⁸² Dugard *op cit* 104.

⁵⁸³ *Katangese Peoples’ Congress v Zaire*, AHRLR 72 (ACHPR 1995), (1996) 3 IHRR. This matter was brought before the African Commission on Human and Peoples’ Rights and addressed the question whether Katanga could break away from the rest of the country.

⁵⁸⁴ S.C. Res. S/5002, U.N. Doc. S/RES/S/5002 (24 November 1961).

⁵⁸⁵ S.C. Res. 277, U.N. Doc. S/RES/S/277 (18 March 1970).

Transkei, Bophuthatswana, Venda and Ciskei,⁵⁸⁶ the Turkish Republic of Cyprus.⁵⁸⁷

Secession appears to succeed when two factors combine: the “separate identify of the seceding region in geographical, historical or constitutional terms” and the denial of the right of self-determination, followed by human rights violation and exhaustion of attempts to secure internal self-determination.⁵⁸⁸ The Supreme Court of Canada in *Quebec* inferred from the paragraph on self-determination of the Declaration on the Granting of Independence a right of external self-determination as a solution (i.e., remedial secession) to cases of extreme oppression of a ‘people’. The African Commission on Human and Peoples’ Rights followed the same approach in the *Katangese Peoples* case.⁵⁸⁹ Other courts followed this approach and backed up remedial secession.

Overall, although the right of self-determination is the basis for virtually all recognition of political entities as states in a post-colonial world, the law of secession is far from settled.

5.2 Caprivi attempted secession

Dugard asks: “Does the right of self-determination give a politically disaffected ethnic minority within a fully independent state the right to determine its destiny by seceding from that state and creating a new state?”⁵⁹⁰ In August 1999, a secessionist group of

⁵⁸⁶ S.C. Res. 402, U.N. Doc. S/RES/S/402 (22 December 1976); and S.C. Res. 407, U.N. Doc. S/RES/S/407 (25 May 1977).

⁵⁸⁷ S.C. Res. 541, U.N. Doc. S/RES/S/541 (18 November 1983); and S.C. Res. 550, U.N. Doc. S/RES/S/550 (11 May 1984).

⁵⁸⁸ Dugard op cit 104.

⁵⁸⁹ The communication was submitted in 1992 by the President of the Katangese Peoples’ Congress requesting the African Commission on Human and Peoples’ Rights to: recognise the Katangese Peoples’ Congress as a liberation movement entitled to support in the achievement of independence for Katanga; - recognise the independence of Katanga; - help secure the evacuation of Zaïre from Katanga. The claim is brought under Article 20(1) of the African Charter on Human Rights’. There are no allegations of specific breaches of other human rights apart from the claim of the denial of self-determination. Because the Katangese people had not faced any severe oppression and discrimination, their quest for independence for Katanga therefore has no merit under the African Charter on Human and Peoples’ Rights. Retrieved from <http://hrlibrary.umn.edu/africa/comcases/75-92.html>. Accessed on 12/04/2017.

⁵⁹⁰ Dugard op cit 99.

armed men in the Caprivi region (now Zambezi region) tried to answer this question in the affirmative. They took arms in an attempt to break the region away from the rest of Namibia. It is a widely held perception – whether justified or not – among the people in that region that they are neglected by the central government and that Caprivi would be better off outside Namibia. In fact, some people from that region still maintain today that Caprivi/Zambezi is not a part of Namibia.⁵⁹¹

That attempted secession was crushed in a matter of days. This was the first and only attempted secession in Namibia's young history as an independent nation.

Although people in the Caprivi region could have successfully made a claim of internal self-determination, from a legal perspective a secession claim would appear much less justified. As I discussed above, international law appears to favour secession or external self-determination only when all the avenues for internal self-determination have been closed. This does not appear to be the case in Namibia. The democratic nature of governance in Namibia, though not perfect, is inclusive enough for the particular development needs of people in the Caprivi/Zambezi region to be catered for.

5.3 Self-determination claims by the Rehoboth Basters

The achievement of self-determination and independence for the people of Namibia did not mean that all ethnic groups in the newly born country felt the same way. A group of Rehoboth Basters lodged a claim, complaining that they have been deprived of their ancestral lands.⁵⁹² The Rehoboth Baster Community (*Gemeente*) are descendants of European settlers in Africa and the Khoi people. In 1967, over 90 families decided to migrate to the then South-West Africa. Upon arrival in Rehoboth, the lands were the territory of the Swartboois. The Basters started to lease the land from the Swartboois and later they drew up a constitution which is today known as the

⁵⁹¹ Se W. Menges, 'Caprivan, not Namibian, Two Say in Treason Trial,' *The Namibian* (2015) Available: <http://allafrica.com/stories/201510071766.html>.

⁵⁹² J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000).

Paternal Laws. In 1875, the Basters entered into negotiations with the Swartboois, in which they purchased the land from them with animals and ox wagons.

Since 1870, the Rehoboth Baster Community administrated their land in accordance with the Paternal Laws, in terms of the said property relations to the benefit of the whole community. Whilst vast tracks of land were expropriated by first the German State and the South African colonial administration, the remaining land was administrated as described until 1990. After Independence, the Namibian state claimed ownership of this land. The Baster community felt that the state expropriated their land and sought to dispossess them of their land in total. What was perceived by the community as the expropriation by Namibian government included investment, development projects, and sacred monuments.⁵⁹³

These claims were articulated on September 19th, 2014, by Martin Dentlinger at the New World Summit. The Basters based their claims on the fact that they had occupied these lands prior to the European invasion or that of the South African apartheid regime, yet they are the only ethnic group that is not recognised by the Namibian government as a traditional authority. Furthermore, they claim to have a deep-rooted link with the land and that they are entitled to their ancestral land just as any other ethnic group in Namibia.

5.4 Claims relating to ancestral lands by the Bethanie community

The Bethanie community is also known for self-determination claims, although theirs is for *internal* self-determination, not secession. Community and land activist Timotheus Pieters claimed at Bethanie in November 2016 that the establishment of Namibia as a unitary state has deprived the indigenous people access to their ancestral lands.⁵⁹⁴ Pieters, furthermore, claimed that there was a strong belief that, if Namibia becomes a semi-federal state, the indigenous people could have the desired access to their ancestral land.⁵⁹⁵ These beliefs

⁵⁹³ M. Dentlinger, speech at the New World Summit (2014) Available at <<http://rehobothbasters.org/history/778-martin-dentlinger-039s-speech-at-the-new-world-summit?id=778>> Last accessed 27 October 2018.

⁵⁹⁴ F. Xoagub, 'Residents in Bethanie in the //Karas Region Want Namibia Declared a Semi-Federal State' *The Namibian* (25 November 2016).

⁵⁹⁵ *ibid.*

stem from what they claim as an unfair allocation of land in the //Karas region. They also believe that proposed semi-federal state would mean the relocation of persons in the boundaries of their ancestral land instead of relocation of people to the lands belonging to other ethnic groups.

However, the claims for a semi-federal Namibia goes against the Namibian Constitution, which affords all persons the right and freedom to settle anywhere they chose within the confines of Namibia.⁵⁹⁶

⁵⁹⁶ Article 21(1) (h) of the Constitution of the Republic of Namibia, 1990.

RECOGNITION OF STATES AND GOVERNMENTS

After a long march and struggle, both on the military and diplomatic fronts, Namibia eventually acceded to both independence and statehood. In this long journey, the liberation struggle scored several victories, which culminated in the country's statehood as Namibia satisfied the four criteria for statehood and enjoyed collective recognition of its statehood.

At this juncture, I explain and expound on the rules governing the recognition of both states and government. The first half of the chapter covers the recognition of states, the other half the recognition of governments. When you pay attention, you realize that the rules that apply in the recognition of governments largely overlap with those applying in the recognition of states.⁵⁹⁷ This chapter may therefore give you the impression that its first half is a duplication of rules and principles I discuss in the second half of the chapter.

When it comes to the recognition of states, the inquiry is whether a would-be state achieves statehood automatically upon meeting the traditional criteria for statehood or whether the international community of nations must add its stamp of approval before the would-be state can join the community of independent states. This dilemma reflects the declarative and constitutive schools of thought on the question of recognition of states. These considerations also pertain to Namibia's accession to statehood. Even if the United Nations was ready to welcome Namibia in the community of independent nations in 1978, that is, even if Namibia met the criteria for statehood in 1978, political calculations by powerful states meant that Namibia could only gain independence from South Africa in March 1990.

With reference to the recognition of governments, when a new government is established by following democratic or constitutional processes, no particular issue arises and the establishment of the

⁵⁹⁷ L. Fred and A.B. Morrison, *Recognition in International Law: A Functional Reappraisal* (University of Chicago 1961) 857.

government typically proceeds smoothly. The international community accepts that the new government has all the rights and obligations that states enjoy and have under international law.⁵⁹⁸

Problems begin when a government is established by force or through unconstitutional means. In those situations, some, most or all countries may deny that the new government should have the rights and obligations traditionally given to states. The status of the new government may be uncertain until other states recognise it as a government. However, the trend appears to be that states will no longer recognize governments; they will only recognise states.

1. Recognition in general

Recognition is the “legal acknowledgment of a factual state of affairs.”⁵⁹⁹ Similar to the recognition of states, the recognition of governments often hinges on the understanding that a new government has effective, *de facto* control over the territory.⁶⁰⁰ The importance of a decision to recognise a state or a government can be assessed in light of its consequences as well as its potential for abuse and manipulation. The recognition of the Transitional National Council by some states while Muammar Gaddafi still controlled the large swathes of territory is a case in point.⁶⁰¹ The recent examples of recognition such as Kosovo have arguably exacerbated uncertainty about the rules on recognition.⁶⁰²

The theory of recognition of governments distinguishes between constitutive and declarative approaches to recognition, and between *de jure* and *de facto* governments. What I say regarding constitutive and

⁵⁹⁸ *ibid* 869 – 870.

⁵⁹⁹ M.N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 393.

⁶⁰⁰ T. Buergenthal and S.D. Murphy, *Public International Law in a Nutshell* (5th edn, St. Paul, Minnesota, West 2002) 39.

⁶⁰¹ See A. Schuit, ‘Recognition of Governments in International Law and the Recent Conflict in Libya’ (2012) 14 *International Community Law Review* 381; see also B. Sautman, ‘Tibet’s Putative Statehood and International Law’, (2010) 9 *Chinese Journal of International Law* 127 (arguing that states such as India and the US treat Tibet as entitled to statehood although it does not meet the traditional criteria for statehood).

⁶⁰² See N. Caspersen, ‘The Pursuit of International Recognition after Kosovo’ (2015) 21 *Global Governance* 393.

declarative schools of thought, with reference to states, also applies to governments. These theoretical distinctions have been decried by jurists such as Brownlie, who I discuss below. However, Janis⁶⁰³ believes the existence of these distinctions merely results from the variety of legal systems, namely municipal laws and international law.

Brownlie⁶⁰⁴ reasons that, since recognition is a matter of intention, it may be express or implied. No problem arises with express recognition. Issues may arise with implied recognition, though the implication of intention is assisted by certain settled rules. Brownlie says that “the implication of intention is a process aided by certain customary rules or, perhaps, presumptions.”⁶⁰⁵

Recognition and its withdrawal are at the end of the political decisions such that a state may decide to recognize or withdraw its recognition of a government based on the state’s own political interests. Attitudes of non-recognition may stem from the political prejudices of individual members and the view that in any case the special qualifications for membership contained in Article 4 are not fulfilled: Statehood may be necessary but is not sufficient.”⁶⁰⁶

Recognition comes in several forms.⁶⁰⁷ As with recognition of states, recognition of governments can be collective. Collective recognition of governments takes place where a number of countries recognize, in a joint declaration, a certain government.⁶⁰⁸ Likewise, a group of countries may decide jointly *not* to recognize a government. Collective non-recognition often occurs where an intergovernmental organization such as the United Nations decides through a resolution *not* to recognize the government of a given state.⁶⁰⁹ One form

⁶⁰³ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen Publishers 2003) 202.

⁶⁰⁴ I. Brownlie, *Principles of Public International Law* (8th edn, Oxford University Press 2012) 94.

⁶⁰⁵ *ibid* 96.

⁶⁰⁶ Janis *op cit* 202.

⁶⁰⁷ J. Serralvo and T.D. Gill *et al.* (eds.) ‘Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya’ (2015) 18 Yearbook of International Humanitarian Law.

⁶⁰⁸ C. Hillgruber, (1998) 9 ‘The Admission of New States to the International Community’ *European Journal of International Law* (Heidelberg Germany) 498. This is the English summary of a study to be published in German under the title, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*.

⁶⁰⁹ *ibid* 492.

generally seen as collective non-recognition in practice is the resolution or decision of an organ of the United Nations “based on a determination that an illegal act has occurred.”⁶¹⁰

Recognition could also be conditional. This refers to a situation where a state makes its recognition of a foreign government subject to the satisfaction of certain conditions, such as the adequate treatment of certain minorities, etc.⁶¹¹ Non-compliance with a condition does not vitiate the initial recognition, though.⁶¹²

In exceptional cases, recognition may also be withdrawn. This occurs with *de facto* recognition as *de jure* recognition is usually permanent and definitive. Thus, if a government loses effective control, a recognizing state may withdraw its recognition.⁶¹³

Non-recognition may be associated with the measures recommended or commanded by an organ of the United Nations as a form of sanction or enforcement against a wrongdoer.⁶¹⁴ An example of this is the then Rhodesia (now Zimbabwe), which lost its recognition in 1965. The Security Council characterized the Smith regime in Rhodesia as “illegal” and “racist,”⁶¹⁵ and called on member states “not to recognize this illegal racist minority régime.”⁶¹⁶ Similar recommendations and sanction were issued with regard to the situation in South West Africa (Namibia) following the termination of South Africa’s mandate South West Africa.⁶¹⁷

The rules and principles on recognition of government⁶¹⁸ limit to some extent the power of a state to recognize a foreign government, but ultimately the decision to recognize or withdraw recognition is a political decision, regardless of what the law may say in a certain situation.

⁶¹⁰ Brownlie op cit 98. See also Shaw op cit 387.

⁶¹¹ Shaw op cit 387.

⁶¹² *ibid.*

⁶¹³ *ibid* 389.

⁶¹⁴ Brownlie op cit 98.

⁶¹⁵ S.C. Res. 217, U.N. Doc. S/RES/217 (20 November 1965).

⁶¹⁶ S.C. Res. 216, U.N. Doc. S/RES/216 (12 November 1965).

⁶¹⁷ See, for example, S.C. Res. 310, U.N. Doc. S/RES/310 (4 February 1972).

⁶¹⁸ S. Talmon, ‘Recognition of states and governments in international law’ (2008) Online Analytical Input from Azerbaijan Diplomatic Academy. Retrieved from http://biweekly.ada.edu.az/vol_1_no_19/Recognition_of_states_and_governments_in_international_law.htm. Accessed on 18/06/2017.

2. The legal effects of recognition

The effects of recognition differ in international law and municipal law.⁶¹⁹ On the international plane, non-recognition does not strip a state of its rights and obligations under international law. In international law, once it has been created, a state continues to exist independently of whether other states recognize its various governments or not.

I must mention that it is not governments, but states, that are subjects of international law. The implication is that, unlike succession of states, changes of governments do not lead to changes in the international law obligations of governments.⁶²⁰

Issues of recognition of government also appear before national courts. In municipal law, recognition is a decision reserved to the executive branch of government.⁶²¹ Courts generally follow the determination made by the executive as to the recognition of governments as well as states. Courts only enforce the legal consequences of such recognition.⁶²² This legal position implies that, in municipal law, recognition of a state or a government by the executive is *constitutive*.⁶²³ This is one major difference between recognition in international law and municipal law.

With recognition, a foreign state or government may sue in domestic courts, its legislative and judicial acts will be given effect in local courts, and it will be entitled to hold property on the territory of the recognizing state.⁶²⁴ Without recognition, a government cannot claim immunity from local courts or obtain – for the purposes of private international law – recognition of its judicial or legislative acts.⁶²⁵

In some national jurisdictions, such as the United Kingdom and the United States, courts have interpreted recognition of governments – and states – retroactively.⁶²⁶ It is, however, worth

⁶¹⁹ Fred and Morrison op cit 864 – 865.

⁶²⁰ Janis op cit 202.

⁶²¹ *ibid*.

⁶²² Shaw op cit 393.

⁶²³ *ibid* 394.

⁶²⁴ *ibid*.

⁶²⁵ Brownlie op cit 97.

⁶²⁶ *ibid* 93.

reminding that retroactivity is not an accepted rule of international law. *Haile Selassie v Cable and Wireless Ltd.*)⁶²⁷ dealt with the retroactive application of recognition as well as the distinction between *de jure* and *de facto*. In that case, the plaintiff, who was the *de jure* sovereign of Ethiopia at the time of filing the claim, brought a suit in 1937 against the defendants to recover a debt. The debt was contracted before Italy formally annexed, in May 1936, Ethiopia in a war of conquest. In the first instance, the court held that the plaintiff, recognized by the United Kingdom as *de jure* sovereign of Ethiopia, had not been divested of his right sue to recover a debt even if Italy was the *de facto* sovereign of Ethiopia. However, while an appeal by the defendants was pending, the United Kingdom recognized Italy as the *de jure* sovereign of Ethiopia in December 1936. The defendants relied on *Luther v Sagor*⁶²⁸ in order to “establish the exclusive power to the *de facto* government.”⁶²⁹ In other words, the court applied the recognition of Italy as the *de jure* sovereign of Ethiopia retroactively. The court held that the debt which was initially part of the public property of the state of Abyssinia (i.e., Ethiopian Empire), vested in the King of Italy and the appeal was allowed.⁶³⁰ This was a retroactive application of recognition in the particular case of state succession.

3. Recognition of states

Recognition of states is the act by which one state recognizes that a political entity also qualifies as a state and satisfies the four essential requirements for statehood.⁶³¹ Dugard holds that recognition by other states demonstrates the capacity to enter into relations with other states.⁶³² In practice, the determination of whether an entity is

⁶²⁷ *Haile Selassie v Cable and Wireless Ltd.* (No. 2), December 6, 1988.

⁶²⁸ *Luther v Sagor*, [1921] 1 K.B. 456; [1921] 3 K.B. King’s Bench Division; Court of Appeal. That case dealt with the effect of recognition in British courts. The plaintiff, a Russian company, argued that a 1919 decree of the Soviet Government should not be recognized by British courts because, among other things, the United Kingdom had not recognized the Soviet Government.

⁶²⁹ Brownlie op cit 100.

⁶³⁰ *ibid.*

⁶³¹ Janis op cit 200.

⁶³² Dugard op cit 91.

a state is no easy matter, but the requirements for statehood are very clear.⁶³³

3.1 Declarative versus constitutive school of thought

A certain level of confusion reigns over the purposes and incidence of unilateral recognition. Two schools of thought exist: declarative and constitutive. The issue that pits these two schools of thought against each other is who gets to decide whether a state has effectively met the four factual criteria for statehood.⁶³⁴ The constitutive school says that it is the international community of states that gets to decide whether an entity has satisfied statehood criteria. From the constitutive perspective, recognition is not automatic upon satisfaction of the criteria. By contrast, the declarative school maintains that the international community of states does not decide whether an entity has become a state: An entity becomes a state as soon as it meets the statehood criteria, irrespective of whether other states have recognized that the entity has met the criteria.

The declarative school of thought holds that an entity becomes a state upon meeting factual criteria for statehood. By contrast, the constitutive school of thought holds that an entity becomes a state upon recognition by other states. Unlike the declarative school, the constitutive school of thought requires recognition as an additional criterion for statehood.⁶³⁵

The court in *S v Banda*⁶³⁶ analyzed the relative merits of the two schools of thought. The matter involved a failed army coup in Bophuthatswana. The leaders of the failed coup were charged with treason. They argued that treason was not a competent charge in that case because treason was a crime against the state and that Bophuthatswana was not a state under international law. The court

⁶³³ Janis op cit 200.

⁶³⁴ Buergenthal and Murphy op cit 36-37.

⁶³⁵ Dugard op cit 89.

⁶³⁶ The leading case in South Africa on recognition is *S v Banda 1989 (4) SA 519 (B)*. In this case the court were to determine whether Bophuthatswana qualified as an independent state, which is necessary in an instance of treason, which can only be committed against a state. The court in determining the statehood of Bophuthatswana considered the constitutive and declaratory theories and came to the conclusion that the declaratory theory was the more acceptable theory.

brushed aside that argument. It favoured the declaratory school because (1) it is supported by most writers and (2) it is less subjective and less politicized. It is, however, necessary for an alleged state to be recognized by other states. This is necessary to avoid a situation where an entity is recognized as a state by some states and it is not so recognized by other states.

There are several objections to the constitutive school. One major criticism is that the constitutive school creates some level of inconsistency.⁶³⁷ If a political entity is recognized by some states and not recognized by others, it is both a state and a non-state. This is the likely interpretation of Taiwan's position: Taiwan is recognized by a few states and not recognized by an increasing number of other states, including the majority of African states.

3.2 How to recognize states and governments

International law does not say how states must recognize political entities wishing to be recognized as states or governments. Recognition often takes the form of a public declaration by a state recognizing the would-be state.⁶³⁸ In a few cases, recognition is inferred from the conduct of a state vis-à-vis the entity wishing to acquire statehood.⁶³⁹ Recognition will be inferred from such conduct as the issuance of passports, the exchange of diplomats, and the signing of bilateral investment treaties. Can recognition of Somaliland by Ethiopia be inferred from Ethiopia's conduct, which includes the entry into an agreement with Somaliland to allow Ethiopia to pay transit rights to Somaliland for Ethiopian goods to transit from the Red Sea through Somaliland to Ethiopia? Although

⁶³⁷ *ibid* the constitutive theory was criticized for being arbitrarily applied and politically based. Ridden with many variables such as ideological and economic motive it was considered an unsuitable theory when the determination of the existence of a legal entity is brought to question.

⁶³⁸ Crawford *op cit* 147.

⁶³⁹ Lauterpacht states that the full international personality of rising communities cannot be automatic. As its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. See Lauterpacht Recognition in J. Crawford, *The Creation of States in International Law* (2nd edn, Oxford Press 2007). Also see J. Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 7-9.

these acts may be indicative of recognition, some scholars would argue that it is not conclusive. And the fact that the African Union has not expressed any intention to recognize Somaliland as a state may strengthen the argument that African countries, including Ethiopia, do not recognize Somaliland as a state.

3.3 Unilateral versus collective recognition

Political entities may be recognized as states unilaterally or collectively. Unilateral recognition occurs where one state decides to recognize a political entity as a state. For instance, Haiti unilaterally recognized Taiwan as a state in 1956, so did Swaziland in 1968. An entity must be recognized as a state before other countries can enter into diplomatic relations with it.⁶⁴⁰

Collective recognition, on the other hand, occurs where two or more states, organized within an international institution such as the United Nations or the African Union, recognize a political entity as a state. Collective recognition is effected directly through an act of recognition or indirectly through admission to membership of an international organization. The classic example of collective recognition is admission of an entity wishing to gain statehood to membership of the United Nations. Thus, the Security Council recommended Namibia to the General Assembly for admission to the UN on April 17th, 1990.⁶⁴¹ The Assembly admitted Namibia in special session on April 23rd, 1990.⁶⁴²

Whereas unilateral recognition is the traditional mode of recognition, collective recognition is both unclear and controversial.⁶⁴³

3.4 Collective (non-)recognition

The proposition that admission to the United Nations constitutes evidence of collective recognition is pertinent to the debate between the declaratory school and constitutive school, too. The UN may block admission of a state to membership of the UN by means of

⁶⁴⁰ Dugard op cit 89.

⁶⁴¹ S.C. Res. 652, U.N. Doc. S/RES/652 (17 April 1990).

⁶⁴² G.A. Res. S-18/1, U.N. Doc. A/RES/S-18/1 (23 April 1990).

⁶⁴³ Dugard op cit 89.

collective non-recognition.⁶⁴⁴ The doctrine of collective non-recognition originates in the non-recognition of the state of Manchukuo in 1932. The UN Security Council's call on members not to recognize the 'racist' and 'illegal' regime of Ian Smith in Southern Rhodesia (Zimbabwe) in 1965 and 1966 is an instance of collective non-recognition. The doctrine of collective non-recognition is also enshrined in the Draft Articles on States Responsibility.⁶⁴⁵

The intergovernmental organizations may deny recognition if the would-be state has made itself guilty of violating some higher norms of international law. The UN has accepted the following peremptory norms⁶⁴⁶ for the purposes of collective non-recognition:

1. the prohibition on aggression
2. the prohibition on the acquisition of territory by means of force
3. the prohibition of systematic racial discrimination and the suppression of human rights
4. the prohibition of the denial of self-determination

Saltzman denies that non-recognition should be necessarily tied to the violation of peremptory norms. He writes that:⁶⁴⁷

[...] identifying the obligation of non-recognition with peremptory norms by the [International Law Commission ('ILC')] and others is a mistake. The ILC cites to the *Namibia Case* as authority, but the *Namibia Case* does not tie the obligation of non-recognition to a peremptory norm.

Crucially, Saltzman's study shows in no ambiguous terms how Namibia led to the development of the rules of international law in

⁶⁴⁴ M. Kohen, *Secession: International Law Perspectives* (Cambridge University Press 2006) 100.

⁶⁴⁵ Article 41(2) of the I.L.C. Draft Articles on the Responsibility of States, 2001.

⁶⁴⁶ W. P. Nagan and J. L. Root, 'The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the UN Charter, and the Application of Modern Communications Theory'.

⁶⁴⁷ A. Saltzman, 'Developing the Principle of Non-Recognition' (2017) 43 Ohio Northern University Law Review 15.

the field of recognition. Relying on the *Namibia Case*,⁶⁴⁸ he identifies three negative requirements flowing from the occupation of territory in violation of international law. In that case, the International Court of Justice called on states to refrain from entering into or applying treaties with a state (i.e., South Africa) that purports to act on behalf of a territory that it occupies (i.e., Namibia).⁶⁴⁹ Second, states must refrain from diplomatic relations that imply the recognition of that state's (i.e., South Africa's) authority over the occupied territory (i.e., Namibia).⁶⁵⁰ Third, they must refrain from entering into economic relations that might entrench the occupier's control over the occupied territory.⁶⁵¹

Thus, South Africa's occupation and administration of South West Africa/Namibia are the archetypal example of non-recognition as a result of the denial of self-determination. Other examples include the Bantustan states in South Africa. In those two cases, the international community refused to recognize situations that had been brought about by South Africa in violation of the local peoples' rights to self-determination. The non-recognition by the UN of the annexation of Crimea by Russia⁶⁵² is another good example of non-recognition as a result of the prohibition on the acquisition of territory by means of force.

One of the best illustrations of collective recognition is the wave of recognition by the UN during the independence of African states in the 1960s. Nigeria, Mali, Senegal, Central African Republic, Gabon, Congo (i.e., DRC or Congo-Kinshasa), Chad, Ivory Coast, Burkina Faso, Niger, Benin, Republic of Congo (i.e., Congo-Brazzaville), Somalia, Malagasy Republic (i.e., Madagascar), Togo, and Cameroon – all these African countries were admitted to the UN in the year 1960.

⁶⁴⁸ *Namibia Case [Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)]*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, 16.

⁶⁴⁹ A. Saltzman op cit 19-20.

⁶⁵⁰ *ibid* 20.

⁶⁵¹ *ibid*.

⁶⁵² E. Milano, 'The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question' (2014) Available at <<http://www.qil-qdi.org/the-non-recognition-of-russias-annexation-of-crimea-three-different-legal-approaches-and-one-unanswered-question/>>. Accessed on 13/04/2017.

Since 1945, the field of state recognition has undergone changes that the drafters of the UN Charter could not have foreseen.⁶⁵³ The distinction between trust territory and colony was rejected; self-determination was recognized as a legal right; colonialism was widely rejected; and the organs of the UN affirmed the right to decolonization.⁶⁵⁴ In a similar vein, the UN adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁶⁵⁵

4. Recognition of governments

The theory of the recognition of governments varies over time and place. At any rate, recognition is an inherently political choice. And this has been the case throughout its history.⁶⁵⁶ Recognition translates a state's desire to be bound by the legal consequences of such recognition.⁶⁵⁷

How exactly a state must recognise a foreign government is a matter left to each state to decide: It is ultimately a unilateral act and a discretion of each individual state.⁶⁵⁸ Laying down criteria for the recognition of governments – as is the case with states – is difficult in large part because there is no widely accepted definition of 'government'.⁶⁵⁹ Effective control over the territory appears the only criterion accepted universally.⁶⁶⁰

4.1 *De jure* recognition

The recognition of a government when the change of government is constitutional does not pose any particular problem.⁶⁶¹

⁶⁵³ Dugard op cit 92-95.

⁶⁵⁴ *ibid.*

⁶⁵⁵ Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514 (XV) (14 December 1960).

⁶⁵⁶ See J. Downer, 'Towards a Declaratory Theory of Government Recognition' (2013) 46 *Vanderbilt Journal of Transnational Law* 581.

⁶⁵⁷ See A. Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012) 14 *International Community Law Review* 381.

⁶⁵⁸ *ibid.*

⁶⁵⁹ Schuit op cit 388.

⁶⁶⁰ *ibid.*

⁶⁶¹ Fred and Morrison op cit 858.

In such cases, the government is recognized by states as both the *de jure* (i.e., legal) and *de facto* (i.e., actual and effective) government of a given state. Dugard says that “when a country assumes effective control of territory with a likely prospect of permanency, it should be given full recognition as a *de jure* government.”⁶⁶²

The situation becomes tricky when the change of government is unconstitutional. First of all, several constitutions prohibit unconstitutional changes of government. This prohibition is often phrased positively as constitutional supremacy. The Namibian Constitution proclaims itself as “the Supreme Law of Namibia,”⁶⁶³ which implies that any change of government outside the framework of the Constitution is unconstitutional and illegitimate. The African Union also prohibits unconstitutional changes of government under article 14(3) of the African Charter on Democracy, Election and Governance Charter.

It is not unusual for such unconstitutional changes to lead to a government that does not exercise control of the entire territory.⁶⁶⁴ Such revolutionary governments may have no intention of complying with certain rules of international law. The revolutionary government may be challenged by rival government(s), as is currently the case in Libya and Somalia.⁶⁶⁵ The new government may be under the effective control of a foreign power.⁶⁶⁶ Or it may accede to power after massive and large-scale human rights violations, for instance, Laurent Kabila and his rebel movement after toppling Mobutu in 1996-1998.

Recognition of such revolutionary governments is problematic because states will have to make a decision as to whether such new governments represent the state and/or its people, and whether it is the type of government they are willing to enter into economic relations with. In other words, states will have to decide whether they

⁶⁶² Dugard op cit 115.

⁶⁶³ Article 1(6) of the Constitution of the Republic of Namibia, 1990.

⁶⁶⁴ The *Tinoco Arbitration* dealt with the recognition of a government in an area already recognised as a state. See M. Dixon *et al. Cases and Materials on International Law* (Oxford University Press) 166 - 168.

⁶⁶⁵ Recommended reading on this: D. Swanson, The Case of Libya: Excerpt from “War No More: The Case for Abolition”, available at <http://worldbeyondwar.org/libya/>. Accessed on 18/06/2017.

⁶⁶⁶ Dugard op cit 112.

wish to recognize such new governments. The military junta called the National Council of Democracy and Development (CNDD)⁶⁶⁷ led by Moussa Dadis Camara in Guinea took power by force on December 23rd December, 2008.⁶⁶⁸ Camara's government was not recognized by many states as *de jure* government. Recognition of Camara's government by states, whether powerful or not, was made difficult by the massive human rights violations that followed its coming into power.⁶⁶⁹ It is a fact that, when a new government has been involved in massive human rights abuses, it is difficult for powerful states to recognize such governments. In the case of Camara's government, on Monday September 28th, 2009, security forces entered a stadium and opened fire on opposition supporters who were peacefully gathered.⁶⁷⁰ One hundred and fifty people were killed; dozens of women were raped and suffered other forms of sexual violence.⁶⁷¹

States do not always have the option to withhold recognition or remain neutral. When a revolutionary government or military junta accedes to power in a particular state, other states may face a dilemma. On the one hand, other states may want to maintain or enter into economic relations with the state controlled by the revolutionary government. On the other, dealing with the revolutionary government may backfire on the states who recognized it if a democratically elected government replace the revolutionary one or the military junta.

The decision by states as to whether they should recognize governments that acceded to power through unconstitutional means

⁶⁶⁷ Its acronym CNDD comes from its title in French 'Conseil National pour la Démocratie et le Développement'.

⁶⁶⁸ BlogGuinée, Documents & Analyses sur la Guinée et l'Afrique, *CNDD. Fighting impunity with impunity*. 2009. Retrieved from <http://www.webguinee.net/blogguinee/2009/03/>. Accessed on 24/06/2017.

⁶⁶⁹ *ibid.*

⁶⁷⁰ Bloody Monday: the September 28 massacre and rapes by security forces in Guinea, *Human Rights Watch*, 2009, Available: <https://www.hrw.org/report/2009/12/17/bloody-monday/september-28-massacre-and-rapes-security-forces-guinea> [2017, July 30]; Guinea: ex-coup leader charged in 2009 massacre, *Human Rights Watch*, 2015, Available: <https://www.hrw.org/news/2015/07/09/guinea-ex-coup-leader-charged-2009-massacre> [2017, July 30].

⁶⁷¹ *ibid.*

is based on political considerations. In that respect, it must be said that recognition by powerful states carries a great deal of weight. Powerful states can provide would-be governments with finance, patronage, protection in international forums, diplomatic cooperation, and military support. This insight explains why Russia's recognition of the breakaway Georgian regions of Abkhazia and South Ossetia have emboldened them and prolonged their existence.

4.2 *De facto* recognition

When a government asserts effective control over the entire territory of a given state, that government is recognized as the *de facto* government of that state.⁶⁷² States have granted *de facto* recognition where:

1. the recognizing state is uncertain about the stability and the policy philosophy of the revolutionary government, and
2. at least two rival governments vie for effective control of the territory.

In this context, 'effective control' is determined by the measure to which the new government commands acceptance by the people.⁶⁷³ Recognition as the *de facto* government does not amount to full recognition. It has been suggested that this form of recognition is appropriate when the government is not firmly established or fails to show a willingness to comply with its international legal obligations.⁶⁷⁴ It is a lower form of recognition.⁶⁷⁵ In practice, states tend to withhold recognition when there is uncertainty as to the permanence of the government or when a rival government stakes a claim as representative of the state. As *de facto* recognition implies a measure of disapproval, it normally does not include an exchange of diplomats.⁶⁷⁶

⁶⁷² T. Ferraro, Legal Adviser, ICRC *Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory* (International Committee of the Red Cross 2012).

⁶⁷³ Buergenthal and Murphy op cit 39.

⁶⁷⁴ Dugard op cit 115.

⁶⁷⁵ *ibid.*

⁶⁷⁶ *ibid* 116.

The effective control test creates the possibility that a government established by force or other unconstitutional means may nonetheless be a *de facto* government because it enjoys widespread acceptance by the people. Arguably, the coming to power of Sisi el-Fattah in Egypt after a *coup* against democratically elected Muhammad Morsi⁶⁷⁷ could be said to fall in that category.

The effective control test is generally easy to apply, but there may be complicated cases where arguments over what portion of the territory or sections within the population the new government effectively controls. However, the decision to recognize a new government does not only depend on effective control. It also depends on political considerations, strategic calculations, the democratic nature of the new government or its willingness to observe international law,⁶⁷⁸ among other things.

The situation in Gambia offers a good illustration of *de facto* recognition. Yahya Jammeh lost the presidential elections held in December 2016 and initially conceded defeat. Later on, President Jammeh said that the elections were rigged and had to be cancelled.⁶⁷⁹ This led to negative reactions from many countries in the world and the regional bloc ECOWAS, which started negotiations to persuade President Jammeh to allow President-elect Adama Barrow to take over as President.⁶⁸⁰ In mid-January 2017, Namibia and Botswana urged President Jammeh to relinquish power, with Botswana going as far as claiming that it will no longer recognize Jammeh as President of the Gambia.⁶⁸¹ Namibia urged the Gambian President to leave

⁶⁷⁷ Aljazeera, President Morsi overthrown in Egypt, 4 July 2013. Retrieved from <http://www.aljazeera.com/news/middleeast/2013/07/20137319828176718.html> Accessed on 01 July 2017.

⁶⁷⁸ See T. Ferraro, Legal Adviser, ICRC *Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory* (International Committee of the Red Cross 2012).

⁶⁷⁹ The Guardian, Gambian president Yahya Jammeh rejects election results, 10 December 2016. Retrieved from <https://www.theguardian.com/world/2016/dec/10/gambian-president-rejects-election-results-yahya-jammeh-adama-barrow>. Accessed on 01 July 2017.

⁶⁸⁰ Aljazeera, Jammeh offered final chance for peaceful exit, 20 January 2017. Retrieved from <http://www.aljazeera.com/news/2017/01/gambia-yahya-jammeh-final-deadline-step-170120044922953.html>. Accessed on 01 July 2017.

⁶⁸¹ PRESS RELEASE Gaborone, 19th January 2017: Following Mr. Yahya Jammeh's refusal to hand over power to the President-elect Adama Barrow, in

office in a statement made by the Minister of International Relations, who is also the Deputy Prime Minister.⁶⁸²

The Gambian case is also an example of collective non-recognition. It could also be argued that, while President Jammeh was the *de facto* sovereign, he was not the *de jure* sovereign. The Gambian case raises interesting political and, to some extent, legal questions. How would states apply the rules of international law if the President refusing to leave office was the sovereign of a major economy on the continent? Gambia is a tiny, largely landlocked country, with a relatively small economy. It is easy for most states to be firm in insisting that international law be applied. But what if the international community was faced with refusal to leave power by the President of a regional powerhouse such as Nigeria, South Africa, Angola or Kenya? Would the regional bloc or the international community insist on the application of international law and democratic principles the same way they did with the Gambian President? Would they deny such *de facto* government recognition?

4.3 The practical validity of the *de jure* and *de facto* distinction

The distinction between *de jure* and *de facto* government is much less relevant from a legal perspective. Some jurists, including Brownlie and Shaw, have questioned the practical usefulness of that distinction. Brownlie⁶⁸³ says that general distinctions between *de jure* governments and *de facto* governments should not be given credit as much depends on the intention of the government in question and the factual and legal contexts. Those distinctions are not very meaningful.⁶⁸⁴ Brownlie⁶⁸⁵ further remarks that it is improbable that

accordance with the expressed will of the Gambian people, the Government of Botswana announces that it will no longer recognise Mr. Jammeh as the President of Gambia, together with his Government. This decision which takes effect immediately is consistent with Botswana's position as articulated through the Press Release of 16th December 2016. Available at <http://citifmonline.com/2017/01/19/botswana-ceases-to-recognize-jammeh-as-president-of-gambia/>. Accessed on 01 July 2017.

⁶⁸² Namibian Sun, Jammeh Must Step Down (16 January 2017). Available at <https://www.namibiansun.com/news/jammeh-must-step-down>. Accessed on 01 July 2017.

⁶⁸³ Brownlie op cit 91.

⁶⁸⁴ Shaw op cit 383.

⁶⁸⁵ Brownlie op cit 91-92

those qualifications or situations (i.e., *de jure* and *de facto*) refer to internal constitutionality. From an international law perspective, recognition of a government as *de facto* government may reflect nothing other than the political judgement of the recognizing state.⁶⁸⁶ It may also reflect a legal determination of the presence of an effective government without any determination as to the permanence and viability of such government.⁶⁸⁷ By recognizing a *de facto* government, a recognizing state could at the same time acknowledge the political reality, serve its own interests while reserving judgements as to the permanence or viability of the change in government.⁶⁸⁸

4.4 The Estrada Doctrine⁶⁸⁹

Not all scholars, experts or states view that it is appropriate to recognize or not a new government. They believe that issues of recognition of governments are national matters to be dealt with by people in the state where the new government has been established. Allowing foreign government to “pass upon the legitimacy of the regime existing in another country with the result that situations arise in which the legal qualifications or national status of governments or authorities are apparently made subject to the opinion of foreigners.”⁶⁹⁰ This position is encapsulated in the 1930 Estrada Doctrine.⁶⁹¹ And it seems, at some level, to be the position that the

⁶⁸⁶ *ibid.*

⁶⁸⁷ *ibid* and Shaw *op cit* 382.

⁶⁸⁸ Shaw *op cit* 382.

⁶⁸⁹ Oxford Reference. “The doctrine that recognition of a government should be based on its *de facto* existence, rather than on its legitimacy. It is named after Don Genero Estrada, the Mexican Secretary of Foreign Affairs who in 1930 ordered that Mexican diplomats should issue no declarations that amounted to a grant of recognition: he felt that this was an insulting practice and offended against the sovereignty of other nations. In 1980 the UK, USA, and many other states adopted the Estrada doctrine.” Retrieved from <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095758788>, Accessed on 01 July 2017.

⁶⁹⁰ P. C. Jessup, ‘The Estrada Doctrine’ (1931) 25, 4 American Society of International Law 719-723. Retrieved from <http://www.jstor.org/stable/2189922>. Accessed on 01 July 2017.

⁶⁹¹ *ibid.*

Chinese government has adopted, with reference to its policy of non-interference in the domestic affairs of other countries.⁶⁹²

The Estrada Doctrine appears to make life easier for many states who may find it difficult to publicly recognize or not recognize governments. Those states would rather deal diplomatically and/or economically with the new government in certain circumstances without having to pronounce themselves on the recognition of such government.⁶⁹³ In particular, the establishment of diplomatic relations with a new government does not *necessarily* entail recognition of the new government.⁶⁹⁴ In the US, however, the power of the President to recognize new governments is expressly provided for in his power to receive ambassadors and public ministers from foreign governments.⁶⁹⁵

There is a thin line between acceptable forms of recognition and interference in the internal affairs of state.⁶⁹⁶ The Nigerian federal government complained about interference in internal affairs when five states recognized Biafra. In 1967, Biafra became a secessionist state of the Nigerian federation. It sought independence. Five countries recognized Biafra's claim to independence, namely Gabon, Zambia, Haiti, Tanzania and Côte d'Ivoire. The rest of the international community did not recognize the 'state' of Biafra. In 1970, Biafra was unsuccessful in establishing its independence, which subsequently led to the withdrawal of recognition of the other states.⁶⁹⁷

Overall, the legal regime governing the recognition of states and governments may easily give the false impression that issues of recognition are frequently solved by complying with that regime. In reality, much of this controversial field of international law is driven by politics and political considerations. Powerful states occasionally

⁶⁹² Since 1954, China has embraced a policy of non-interference in other countries' internal affairs.

⁶⁹³ Buergenthal and Murphy op cit 41.

⁶⁹⁴ *ibid.*

⁶⁹⁵ Section 3 of Article 2 of the Constitution of the United States, 1787. The Constitution empowers the US President to "receive Ambassadors and other public Ministers".

⁶⁹⁶ A. Paphiti, 'Intervention in the Internal Affairs of States' (E-International Relations 2011). Retrieved from <http://www.e-ir.info/2011/10/25/intervention-in-the-internal-affairs-of-states/>. Accessed on 01 July 2017.

⁶⁹⁷ M.Griffiths, *Encyclopedia of International Relations and Global Politics* (2013) 716.

dictate which would-be states or governments should be recognized, which rules or institutions will be upheld or strengthened, which ideas will prevail, and which ethnic or sectional interests will be safeguarded.

TERRITORY

Territory is one of the criteria for statehood. It also serves as the most common basis for the recognition of governments. “Sovereignty itself, with its retinue of legal rights and duties, is founded upon the fact of territory”.⁶⁹⁸ Territory is the most understood and the most accepted defining feature of a state.⁶⁹⁹

Each portion of the earth is claimed by a state. But that does not mean that all the borders are fully defined, settled or undisputed. The only exception is Antarctica, which belongs to no state. In the past, territory was claimed by different political communities, many of whom were regarded as primitive. Whatever the description of these communities, they could be fairly said to lack the level and sophistication of organization of modern states.

Today, recognition by states is the primary way of acquiring territory. The old rules on the acquisition of territory still apply, but recognition has become the principal way of acquiring territory.

The rules that regulate the acquisition of territory under international law differ from those that regulate territorial acquisition under municipal law.⁷⁰⁰ In municipal law, the rules relating to the acquisition and control of territory are often detailed as they regulate one of the basic resources and wealth-creating factors of a state.⁷⁰¹ In Namibia, a maze of highly elaborate legislative instruments govern the acquisition of territory in the form of land. In addition to the constitutional provisions on territory,⁷⁰² property,⁷⁰³ and ownership of natural resources,⁷⁰⁴ those instruments include the Land Titles

⁶⁹⁸ M.N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 409.

⁶⁹⁹ *ibid.*

⁷⁰⁰ D. W. Greig, ‘Sovereignty, Territory and the International Lawyer’s Dilemma’ (1988) 26, 1, 5 *Osgood Hall Law Journal* (York University) 133.

⁷⁰¹ Shaw *op cit* 410 – 411.

⁷⁰² Article 1(4) of the Constitution of the Republic of Namibia, 1990.

⁷⁰³ Article 16 of the Constitution of the Republic of Namibia, 1990.

⁷⁰⁴ Article 100 of the Constitution of the Republic of Namibia, 1990.

Proclamation Act of 1921,⁷⁰⁵ the Land Tenure Act of 1966,⁷⁰⁶ the Land Survey Act of 1993,⁷⁰⁷ the Agricultural Land Reform Act of 1995,⁷⁰⁸ the Communal Land Reform Act of 2002,⁷⁰⁹ the Flexible Land Tenure Act of 2012,⁷¹⁰ and the Urban and Regional Planning Act, 5 of 2018.⁷¹¹

By contrast, the rules of international law that relate to the acquisition and control of territory do not have the same level of clarity and sophistication as those found in municipal law.⁷¹² Similarly, there is a difference in the legal consequences that result from a change in ownership between international law and municipal law.⁷¹³ In international law, a change in the ownership of territory leads to a change of sovereignty, unlike municipal law, where a change of legal ownership does not lead to the same outcome.⁷¹⁴

Another difference between municipal law and international law, where territory is concerned, is that, in international law, title to territory is relative, not absolute.⁷¹⁵ This means that, in international law, territory belongs to the party that puts forth the best case or argument.⁷¹⁶ Under international law, a change of territory implies a change of sovereignty and nationality of the territory in question as well as a change in allegiance by the people inhabiting that territory. In municipal law, title to territory does not ordinarily depend on the relative strength of person's claim to title.

The basis and the contours of boundaries are less clear in international law. The essence of territorial sovereignty is encapsulated in the notion of title.⁷¹⁷ Title may be defined as the

⁷⁰⁵ Land Titles Proclamation Act, 2 of 1921.

⁷⁰⁶ Land Tenure Act, 32 of 1966.

⁷⁰⁷ Land Survey Act, 33 of 1993.

⁷⁰⁸ Agricultural (Commercial) Land Reform Act, 6 of 1995. Other relevant legislation comprise the Subdivision of Agricultural Land Act, 70 of 1970.

⁷⁰⁹ Communal Land Reform Act, 5 of 2002.

⁷¹⁰ Flexible Land Tenure Act, 4 of 2012.

⁷¹¹ Urban and Regional Planning Act, 5 of 2018. Other relevant legislation comprises the National Housing Enterprise Act, 5 of 1993; and the National Housing Development Act, 28 of 2000.

⁷¹² Shaw *op cit* 410 – 411.

⁷¹³ *ibid.*

⁷¹⁴ *ibid.*

⁷¹⁵ *ibid* 412 – 413.

⁷¹⁶ *ibid* 413.

⁷¹⁷ *ibid* 412.

factual and legal conditions under which one portion of territory is deemed to belong to a person or a group of persons or to a particular authority.⁷¹⁸

1. 'Territory' in theory and in Namibia

An in-depth grasp of territory in international law calls for a sound understanding of the notion of 'territory' in theory as well as in practice. Both theory and practice of territorial claims are a disputed terrain. At a minimum, five philosophies inform border-drawing. The functional theory holds that territorial boundaries must be drawn based on the ability of political units to perform economic and other functions.⁷¹⁹ Next, the political perspective argues that borders must reflect the ability of political units to enclose a well-functioning *democratic* state.⁷²⁰ Third, the homeland approach seeks to draw borders depending on pre-existing territorial claims of groups and other groups.⁷²¹ A fourth theory, which I call 'ethnic', tries to justify the drawing of boundaries in terms of (self-)identified ethnic groups or ethnic-based political communities.

My own view is that 'territory' in the context of Namibia and many other countries in Africa is to a considerable degree guided by history. In other words, border-drawing in Africa owes more to colonial history than to the ethnicity of the people claiming title to territory. Nonetheless, the ethnic perspective influences the rhetoric of countless self-determination claims, for example, the secessionist ambitions voiced by some sections of society in the former Caprivi region of Namibia and in the Quebec province of Canada.

In Namibia, Article 1(4) of the Constitution demarcates the country's territory as follows:

[t]he national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis

⁷¹⁸ *ibid.*

⁷¹⁹ D. Miller, 'Boundaries, Democracy and Territory' (2016) 61 *American Journal of Jurisprudence* 37-40.

⁷²⁰ *ibid* 40-44.

⁷²¹ *ibid* 44-47.

Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.

Note that the Constitution relies on the “international community through the organs of the United Nations” to define its territory.

Territory was an aspect of a recent case that appeared before the High Court of Namibia. In *S v Malumo*, Namibia’s sovereignty over territory known and described as ‘Eastern Caprivi Zipfel’ was called into question.⁷²² In that case involving alleged Caprivi secessionists, the prosecution invited as witness Sackeus Akweenda, an expert on Namibia’s territory. He testified that the boundaries of Namibia are found in three legal instruments, namely the Germany/Portuguese declaration of 1886, the Anglo-German Agreement of 1890, and the Taalweg agreement of 1932 between Namibia and South Africa. More precisely,⁷²³

[t]he whole north, with the exception of notification or clarification of where there were disputes or where there were uncertainties so the whole north from the mouth of the Kunene to the Zambezi River by the Katima rapids is the Germany/Portuguese declaration of 30 December 1886. Then the whole South, which is from the mouth of the Orange River is the agreement of 1 July 1890, that is, the Anglo Germany Agreement. That agreement defined boundaries of wherever a German colony touched a British territory. Everything is in that document... By the time Germany lost its colony, German South West Africa, the boundary constituted by the Zambezi River... was not defined... What happened is that in 1932, starting all the way from 1931, the Union of South Africa and the administration in Northern Rhodesia [i.e., present-day Zambia] have been negotiating, which negotiations led them to the exchange of notes whereby they agree[d] that the Taalweg should be the boundary in that river. Then they demarcated it. They went all the way to prepare a map depicting which Islands where that line runs and they define which island [fell] to South West Africa and which island fell to

⁷²² *S v Malumo* (CC 32-2001) [2015] NAHCMD 213 (7-14 September 2015) para. 1008.

⁷²³ *ibid* para. 1010. This citation has been edited given that the original transcript contains many typographical errors.

Northern Rhodesia, ... those two exchange[s] of notes are what I refer to as the third instrument to the extreme north, east.'

What was central to Akweenda's description of Namibia's boundaries is that Caprivi [now Zambezi Region] became part of Namibia following the 1886 Agreement between Germany and Portugal.⁷²⁴ In particular, the Court ruled that, from Akweenda's evidence, it appeared that the territory known as the Caprivi Zipfel has since 1890 been part of the territory of Namibia although occasionally it had been administered separately from the rest of Namibia.⁷²⁵

Akweenda referred the High Court to Article III of the 1890 Anglo-German Agreement of 1890 and an official map compiled by the United Nations General in one of its resolutions in 1976.⁷²⁶ Article III reads in relevant part as follows:⁷²⁷

In Southwest Africa the sphere in which the exercise of influence is reserved to Germany is bounded:

1. To the south by a line commencing at the mouth of the Orange river, and ascending the north bank of that river to the point of its intersection by the 20th degree of east longitude.

2. To the east by a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude; it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18th parallel of south latitude; it turns eastwards along that parallel till it reaches the river Chobe; and descends the center of the main channel of that river to its junction with the Zambesi, where it terminates.

2. Territorial claims and disputes

Territorial disputes continue to this day, especially in Africa, where borders were artificially drawn.⁷²⁸ There are currently about

⁷²⁴ *ibid* para. 1014.

⁷²⁵ *ibid* para. 1017.

⁷²⁶ Resolution A/RES/31/150 of 20 December 1976.

⁷²⁷ As reported in *S v Malumo*, para. 1014.

⁷²⁸ Shaw *op cit* 410 – 411.

150 territorial disputes in the world.⁷²⁹ A surprisingly great number of borders are the subject of adjudication or arbitration,⁷³⁰ some involving large portion of territory.⁷³¹ The Polisario liberation movement and the government of Morocco have locked horns over territory in Western Sahara, the breakaway region of Somaliland and the government of Somalia have also clashed over territory, Sudan and South Sudan over the Abyei border region, Japan and China over the Senkaku (Diaoyu) Islands, Eritrea and Djibouti over the Dumeira Island and Mountain, and Russia and Ukraine over Crimea. Israel has exchanged fire with Palestine over the Gaza Strip and with Syria over the Golan Heights. Those examples are just the tip of an iceberg. The Bir Tawil is quite unusual in the sense that both Egypt and Sudan claim that this region belongs to the other state. This 'dispute' makes Bir Tawil one of the very few 'unclaimed' corners of the globe.⁷³²

Most territorial disputes are dormant, and it is only when tension rises to the point of threatening peace and security that these disputes receive greater attention and publicity.⁷³³ These disputes have been typically resolved by the weighing of evidence adduced by the parties to establish effective occupation or the uninterrupted display of sovereignty.⁷³⁴ In *Minquiers and Ecrehos*, France and the United Kingdom produced evidence to establish title to the islets and rocks

⁷²⁹ Some scholars put the figure at about 150 disputed territories. See E. Conant, *6 of the World's Most Worrisome Disputed Territories*, *National Geographic* (2014) Available at <<http://news.nationalgeographic.com/news/2014/03/140328-disputed-territories-geography-russia-crimea/>>. Accessed on 05 July 2017. The figure of 200 was notably put forth by Israel Benjamin Netanyahu, when complaining that the labelling of products coming from Israeli settlements discriminated against Israel. See also J. Kay, 'Alexis Troubetzkoy on Hans: Do We Now Have a Common Border with the EU?' *National Post* (11 April 2012). Available at <<http://nationalpost.com/opinion/alexis-troubetzkoy-on-hans-we-now-have-a-common-border-with-the-eu/wcm/b196ed54-cdce-4074-bae0-ed52794c2aa>>.

⁷³⁰ I. Brownlie, *Principles of Public International Law* (8th edn, Oxford University Press 2012) 125.

⁷³¹ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen Publishers 2003) 200.

⁷³² Jason, '25 Most Controversial Territorial Disputes,' List25, 21 August 2018, Available at <<https://list25.com/25-most-controversial-territorial-disputes/3/>> Last accessed 24 October 2018.

⁷³³ Brownlie op cit 125.

⁷³⁴ *ibid*.

of the Minquiers and Ecrehos groups.⁷³⁵ To determine which state owned the islets and the rocks, the I.C.J. weighed the evidence put forth by the parties and unanimously concluded that sovereignty over those territories belonged to the United Kingdom.

Territorial disputes may be grouped in two categories: disputes relating to the status of the country itself and disputes relating to a part of the territory that two or more states claim.⁷³⁶ The *South West Africa/Namibia* dispute⁷³⁷ falls in the first category because it mainly concerned the status of South West Africa/Namibia. The claims that Somalia made with respect to the north-east of Kenya and the south-east of Ethiopia⁷³⁸ fall in the second category.

Territorial claims may be based on several arguments:⁷³⁹ Occupation, prescription, self-determination, among other things.

⁷³⁵ *Minquiers and Ecrehos Case (France v. U.K.)*, I.C.J. Reports 1953, 47.

⁷³⁶ *ibid* 413.

⁷³⁷ See E. A. Gross, 'The South West Africa Case: What Happened?' *Foreign Affairs* (October 1966). Available at <<https://www.foreignaffairs.com/articles/namibia/1966-10-01/south-west-africa-case-what-happened>> Also *Advisory Opinion on Namibia*, Case Briefs, I.C.J., Advisory Opinion, 1971, I.C.J. Rep 16, Available at <<http://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-3/advisory-opinion-on-namibia/>>. And C. Heyns and M. Killander, *South West Africa/Namibia (Advisory Opinions and Judgments)* (Oxford Public International Law 2007) Available at <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e209>>. Last accessed 5 July 2017.

⁷³⁸ W. Kabukuru, 'The Kenya-Ethiopia Defence Pact: Has Somalia become a pawn?' *New African* (2015) Available at <http://newafricanmagazine.com/kenya-ethiopia-defence-pact-somalia-become-pawn/>. The long history of the Kenya-Ethiopia Defence Pact remains as relevant today as it was at its first signing 60 years ago. At the time of signing this treaty in 1964, the two nations viewed Somalia as a threat due to the Horn of Africa nation's irredentist ambitions. The "Greater Somalia" quest, whereby Mogadishu had on several occasions laid claim to parts of northern Kenya and southern Ethiopia mainly inhabited by members of the Somali community, is what inspired this binding defence treaty.

⁷³⁹ A. Imseis, *Acquisition of Territory, Annexation and the Jordan Valley* (UNRWA, West Bank Field Office, AL-Quds University/Diakonia IHL Forum 2007) 1. Traditionally, international law has prescribed several distinct modes by which sovereignty can be acquired over territory. Simply put, these include: Cession (transfer of territory by treaty or agreement); Occupation (not to be confused with "occupation" in IHL terms, but only in relation to possession with intent to control to the exclusion of others *terra nullius*); Prescription (possession with intent to control to the exclusion of others the territory of another state; possession doesn't result from international armed conflict); Operation of Nature (i.e. volcanic islands

How a state actually acquires its own territory is an intricate question. It is both a legal and political question.⁷⁴⁰ One proposed solution is that recognition ‘constitutes’ the state and the territory of the state is, upon recognition, accepted as belonging to the state in question, regardless of how that state acquired the territory in the first place.⁷⁴¹ This approach is not widely accepted.⁷⁴²

3. Intertemporal law

In the leading case of *Island of Palmas*,⁷⁴³ the arbitrator enunciated two principles of intertemporal law. The first principle is that a dispute has to be decided in light of the law as it existed when the relevant acts occurred, and not according to the law at the time the dispute was referred to a forum for settlement. The second principle is the existence of a right has to be manifested by complying with ‘the conditions required by the evolution of the law’.

While the first principle is generally accepted, the second principle is controversial. The second principle has been criticized as requiring that title be manifested at all time, thereby threatening many existing titles and leading to instability.⁷⁴⁴

The implications of the second principle are illustrated by the dispute involving South Africa’s occupation of Walvis Bay before 1994. Even before the Berlin Conference that took place in 1884, Walvis Bay was officially proclaimed a British Crown territory in 1878.⁷⁴⁵ Walvis Bay was annexed to the Cape Colony in 1884,

emerge in a state’s territorial waters); and Conquest (right to acquire territory by force of arms; outdated, unlawful now).

⁷⁴⁰ Shaw op cit 414.

⁷⁴¹ *ibid.*

⁷⁴² *ibid.*

⁷⁴³ *Island of Palmas Case (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA].*

⁷⁴⁴ Brownlie op cit 127.

⁷⁴⁵ Walvis Bay. Available at

https://www10.dict.cc/wp_examples.php?lp_id=1&lang=en&s=Walvis%20Bay. During the scramble for Africa, the United Kingdom occupied Walvis Bay and a small area surrounding the territory, and permitted the Cape Colony to annexe it in 1878, both to forestall German ambitions in the region, and to ensure safe passage of British ships around the Cape. Walvis Bay was the only known natural harbour on the Namibian coast. Consequently when the Germans later colonised

sometime before Germany made South West Africa its Protectorate. In 1910, the Union of South Africa was established, and Walvis Bay was made part of the Union.⁷⁴⁶ In 1915, South Africa occupied South West Africa during World War I. After Germany was defeated, South Africa was entrusted with the administration of South West Africa.⁷⁴⁷ South Africa then administered Walvis Bay as if it was part of South West Africa. In 1977, when South Africa foresaw Namibia's independence, it exercised its jurisdiction over Walvis Bay and made it part of the Cape Province once again.⁷⁴⁸ Thus, if the second principle of intertemporal law is applied to the Walvis Bay case, the territorial title that South Africa held over Walvis Bay no longer avail because it is contrary to present rules of international law, especially the right to self-determination, which is a *jus cogens* norm.

Dugard⁷⁴⁹ objected to that interpretation and contended that this line of reasoning amounts to a retroactive application of a *jus cogens* norms to territorial titles – an interpretation he deems “positively dangerous”. This whole matter all boils down to what rules should apply: The ones that originally applied when Walvis Bay was first made a British Crown territory or the ones that applied at the time when South Africa decided to re-integrate Walvis Bay into South Africa?

Given that South Africa removed Walvis Bay from Namibia at a time when the latter was under South Africa's occupation and when the Namibian people could not freely voice their opinions, there is a compelling case for the proposition that South Africa, by so doing, violated international law in circumstances where Walvis Bay had been legally and legitimately made part of Namibia.

the region, only Walvis Bay remained as an enclave of the Cape Colony, and out of German control.

⁷⁴⁶ *ibid.*

⁷⁴⁷ C. Botha, ‘Internal colonisation and an oppressed minority? The dynamics of relations between Germans and Afrikaners against the background of constructing a colonial state in Namibia, 1884 – 1990’ (2007) 2 *Journal of Namibian Studies* (Otjivanda Presse. Essen Eckl & Hartmann GbR) 7 – 50.

⁷⁴⁸ E. de Klerk, ‘Walvis marks 20 years or reintegration’ *New Era Newspaper* (7 April 2014) Available at <https://www.newera.com.na/2014/04/07/walvis-marks-20-years-reintegration/>. On August 31 1977, the territory's administration was once again transferred to the Cape Province in an apparent attempt to avoid losing Walvis Bay to a Swapo government.

⁷⁴⁹ Dugard *op cit* 129.

The real question is not whether international law was applied retroactively, it is whether the original integration of Walvis Bay into Namibia was valid. Similarly, it would not be tenable for Russia to claim back Alaska from the United States on the ground that it has an original title to the territory because the cession of Alaska by Russia to the United States was valid.

4. Sanctity of colonial borders

States have agreed to keep the boundaries they have inherited from colonialism.⁷⁵⁰ This position is reflected in the principle of *uti possidetis (juris)*. The Organization of African Union, and later its successor the African Union, has endorsed this principle.⁷⁵¹ Although the African Union and the international community have allowed the secession of South Sudan,⁷⁵² the general principle remains that colonial boundaries must be respected.

Originating in Roman law, the *uti possidetis* principle reinforces territorial integrity. Territorial integrity, in its turn, makes sure that would-be states do not become states automatically upon the fulfilment of the criteria for statehood.⁷⁵³ Like Williams remarked, since existing states make international law, it comes as no surprise that they make it difficult for a new state to emerge out of an existing state's territory.⁷⁵⁴ As a result, the intricate rules on self-

⁷⁵⁰ M. Fisher, 'The Dividing of a Continent: Africa's Separatist Problem' (2012) Retrieved from <https://www.theatlantic.com/international/archive/2012/09/the-dividing-of-a-continent-africas-separatist-problem/262171/>. Accessed on 05 July 2017.

⁷⁵¹ For example, in its Judgment of 12 July 2005, the Chamber of the Court in the case concerning the *Frontier Dispute (Benin/Niger)*, after referring to the 1986 Judgment, stated that the principle of *uti possidetis juris* had been recognized on several occasions in the African context and that "it was recognized again recently, in Article 4 (b) of the Constitutive Act of the African Union" (*I.C.J. Reports 2005*, p. 108, para. 23). *Frontier Dispute, Judgment*, *I.C.J. Reports 1986*, 565-566, para. 22.

⁷⁵² M. Riegl and B. Dobos, 'Unrecognised States and Succession in the 21st Century' in K. Rudinova (eds.) (Springer 2000). Although the case of South Sudan showed more signs of secession than Somaliland, in this case it was acceptable for the African Union to recognise its independence, because there was a long civil war going on that resulted in a humanitarian crisis.

⁷⁵³ J. Vidmar, 'Territorial Integrity and the Law of Statehood' (2012) 44 *George Washington International Law Review* 697.

⁷⁵⁴ P.R. Williams, 'What Makes a State? Territory' (2012) 106 *American Society of International Law Proceedings* 449.

determination, statehood and secession leave independence-seeking groups with two options: either obtaining independence at gunpoint as happened in South Sudan, or suffering such systematic and widespread human rights violations that other states have to intervene, like in Kosovo's case.⁷⁵⁵ Either way, violence is inevitable since independence by mutual agreement of the opposing parties is very rare.⁷⁵⁶

Some scholars have raised the question as to the desirability of withdrawing Africa's borders. The question is highly sensitive and controversial. The general feeling is that such a move is going to open a Pandora's Box and would create more problems than it can reasonably solve. In short, the fear is that the re-configuration of Africa's territorial borders by taking into account political and demographic realities is most likely to lead to great instability.

It can, however, be argued that instability will be temporary and that the stability that will follow from the re-drawing of the African map would bring much greater stability than if the borders were kept as arbitrary as colonial masters left them.⁷⁵⁷ In other words, the temporary stability that the re-configuration of the continent would endure is a small price to pay compared to the greater benefits and stability that will result from the redefinition of Africa's territorial borders. Still, judging from the current attitude of African states, political leaders do not seem ready to take the risks linked to the redrawing of the continent's atlas.

5. The different ways of acquiring territory

Territories have often been acquired for several reasons, including war, revolution or simple sale.⁷⁵⁸ And treaties have served to facilitate those territorial acquisitions or settle disputes over territorial boundaries.⁷⁵⁹ The 1783 Treaty of Peace between Great

⁷⁵⁵ *ibid.*

⁷⁵⁶ *ibid.*

⁷⁵⁷ This was an argument made by Michael Hamukwaya in class in 2017. Michael's thesis led to an interesting and lively debate in class.

⁷⁵⁸ Janis *op cit* 199.

⁷⁵⁹ *ibid.*

Britain and its 13 former colonies settled the boundaries between the United States and Canada.⁷⁶⁰

Brownlie⁷⁶¹ thinks that the whole notion of the different modes or ways of acquiring territory is unsound since labels are a very poor substitute of careful analysis. Courts will focus more on evidence of exercise of sovereignty at the critical times and, in the process, it will use one of the traditional modes of acquiring territory to justify its reasoning.⁷⁶² Brownlie contends that the significance of proving a 'better title' will be lost if too much emphasis is placed on the traditional modes of acquiring territory.⁷⁶³

There is a distinction between original and derivative title to territory. Occupation is usually considered as an original way of acquiring territory whereas cession is considered to be derivative.⁷⁶⁴ 'Original' title relates to situations where a person acquires territory for the first time. Any transfer of that original ownership to another person qualifies as 'derivative' because it derives, it flows from the original title. However, this classification of title between original and derivative is treated as simplistic.⁷⁶⁵

5.1 Old forms of acquisition of territory

Discovery, occupation and conquest are no longer in use as ways of acquiring territory in international law.⁷⁶⁶ Historically, one could acquire title to a territory by discovery.⁷⁶⁷ The idea was that one had

⁷⁶⁰ *ibid.*

⁷⁶¹ Brownlie *op cit* 129 and 150.

⁷⁶² *ibid* 129.

⁷⁶³ *ibid.*

⁷⁶⁴ *ibid* 130.

⁷⁶⁵ *ibid.*

⁷⁶⁶ O. Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press) 306.

⁷⁶⁷ Lindley in the *Western Sahara* Advisory Opinion, ICJ Reports 1975: 39. in J. McHugo, ed. C. Schofield, *Boundary and Territory Briefing*, Vol. 2, No. 4, How to Prove Title to Territory: A Brief, Practical Introduction to the Law and Evidence, UK, University of Durham, 1998, p. 4. In the 17th century, it was possible to acquire a provisional, 'inchoate' title by discovery. Discovery probably did not in itself confer possession, because it did not, of itself, imply the taking of possession with the intention to possess. However, it was recognised that when a power discovered territory, this of itself gave that power the right to acquire that territory within a reasonable period of time, against the right of other powers.

an incomplete title to that territory until the effective occupation of that territory.

With reference to occupation, it is one way of acquiring territory that is not owned by anyone. Such territory is referred to as '*terra nullius*'.⁷⁶⁸ If territory was uninhabited or, perhaps, only fitfully inhabited by groups of people with no political organisation, then it was deemed in international law to be *terra nullius* – '*the territory of nobody*'.⁷⁶⁹ Today, all territory on earth has already been claimed by states, except Antarctica and Bir Tawil. This lack of claimable territory means that there is no part of the globe that could be legitimately called *terra nullius*.

Regarding conquest, it was accepted in the past as a valid method of acquiring territory. Both occupation and conquest required the intentional or psychological element⁷⁷⁰ (the *animus*: the intention to acquire the territory) and the physical element (the *corpus*: the effective control of the territory). If acquisition of a territory by conquest had not already ceased to be legal at an earlier date, it became so with the establishment of the United Nations (UN) and the adoption of the prohibition on the use of force against the territorial integrity of another state in Article 2(4) of the UN Charter.⁷⁷¹ Oppenheim⁷⁷² is of the view that war waged for the purpose of acquisition of territory has probably been unlawful since Article 10 of the Covenant of the League of Nations. In addition, in 1928 the Kellogg-Briand Pact made war illegal as an instrument of national policy.⁷⁷³

Was Africa discovered, occupied or conquered? From an African vantage point, it makes no sense to talk about 'discovery' because

⁷⁶⁸ C. Schofield, 'Boundary and Territory Briefing' (1998) 2, 4 J. McHugo (ed.) *How to Prove Title to Territory: A Brief, Practical Introduction to the Law and Evidence* (University of Durham) 4.

⁷⁶⁹ *ibid.*

⁷⁷⁰ Dr. W. Abdulrahim, 'State and Territorial Sovereignty'. Available at <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/6-state-territory-and-territorial-sovereignty>. The presence and control of a State over the concerned territory must be effective. Effectiveness requires on the part of the Claimant State two elements: an intention or will to act as sovereign, and the adequate exercise of sovereignty.

⁷⁷¹ C. Schofield *op cit* 3.

⁷⁷² L. Oppenheim, *International Law* in R.J. Jennings and A.D. Watts (eds.) (9th edn. London 1992).

⁷⁷³ C. Schofield *op cit*.

Africans did not start to exist when they first met traders from the Middle East, European explorers, or the colonial settlers. After all, the continent is reputed as the cradle of humankind. From the same vantage point, it is more accurate to depict the continent as conquered or occupied following the 1884-85 Berlin Conference. And, depending on the historical trajectories of each nation on the continent, each distinct 'territory' was either conquered or occupied, or both. It is reasonably plausible that Namaqualand,⁷⁷⁴ present-day Namibia, was occupied, rather than conquered. This is because the early years of the German presence in South West Africa after the Berlin Conference were relatively peaceful.

5.2 Territory acquired as a result of self-determination claims

It is not unusual for a state to lay a claim to a territory on the basis of self-determination.⁷⁷⁵ In such circumstances, the claiming state will argue that the territory in question belongs to it because of legal or historical ties. This was the claim made in the *Western Sahara* advisory opinion.⁷⁷⁶ Likewise, it was the claim made by Saddam Hussein's Iraq over Kuwait.⁷⁷⁷ But these claims were rejected.

The current position in international law is thus that a state cannot acquire territory by virtue of legal or historical ties. Before 1994, Walvis Bay was regarded as a colonial enclave. The position in international law is that self-determination in the case of colonial enclaves that are non-self-governing may take the form of either free choice of the people of the enclave or automatic reintegration in the larger claimant state.⁷⁷⁸ In situations where the colonial enclave is small and forms an integral part of the larger claimant state, the UN

⁷⁷⁴ 'Namaqualand' was the name of the territory roughly associated with present-day Namibia.

⁷⁷⁵ B. T. Sumner, 'Territorial Disputes at the International Court Of Justice' 1786. Available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1227&context=dlj>. Many scholars believe that under international law, effective control is the shibboleth—indeed, the *sine qua non*—of a strong territorial claim.

⁷⁷⁶ *Western Sahara, Advisory Opinion*, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, International Court of Justice [ICJ].

⁷⁷⁷ H. H. Abidi, 'India International Centre Quarterly Origins and Dimensions of the Iraqi Claim Over Kuwait' (1991) 18, 1 India International Centre 129-143. Available at <http://www.jstor.org/stable/23002125>

⁷⁷⁸ Dugard op cit 143.

(i.e., the Security Council and the General Assembly) does not require the free choice of the people through, for instance, a referendum.⁷⁷⁹ That was the case for Walvis Bay.

5.3 Annexation

Annexation is “the forcible acquisition of territory by one state at the expense of another”.⁷⁸⁰ Because it entails the acquisition of territory by force, annexation falls under the prohibition on the use of force by Article 2(4) of the UN Charter. Article 2(4) expressly protects the territorial integrity of states.⁷⁸¹ In the *Namibia Case*, South Africa viewed its mandate over South West Africa/Namibia as entailing the annexation of Namibia.⁷⁸² The Court rejected South Africa’s argument and held that it was not the object nor the purpose of the mandate system to have such practical effect.⁷⁸³

While territorial annexation is no longer allowed, this prohibition does not imply that annexations have stopped. Consider Russia’s annexations of Abkhazia and South Ossetia from Georgia in August 2008 as well as Crimea from Ukraine in March 2014. Most states, however, do not recognise these territorial acquisitions. The pre-Independence in Namibia may help resolve cases of annexation to the extent that the *Namibia Case* led to the adoption of obligations *erga omnes* and set forth three obligations on states to refrain from recognising directly or indirectly a state of affairs brought about in violation of international law, such as the Russian annexations I mentioned above.

⁷⁷⁹ *ibid.*

⁷⁸⁰ R. Hofmann, ‘Annexation,’ in *Max Planck Encyclopedia of Public International Law* (February 2013) Available at <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376>> Last accessed 24 October 2018.

⁷⁸¹ Article 2(4) of the UN Charter reads as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity... of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

⁷⁸² *Namibia Case [Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)]*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, 16, para. 45.

⁷⁸³ *Namibia Case [Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)]*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p.16, para. 50.

5.4 Accretion

It is possible for a state to acquire territory as a result of natural forces.⁷⁸⁴ Deposits on a sea coast may result in an extension of territory,⁷⁸⁵ and no ostensible, official acts of appropriation are necessary. Examples include the rise of a volcanic island within a state's territorial sea.

5.5 Cession

Cession arises where one state transfers sovereignty over territory to another state.⁷⁸⁶ Before the end of the World War II, territory would sometimes be ceded by the vanquished state to the victorious state.⁷⁸⁷ A prime example is the cession of Walvis Bay and the Penguin Islands by South Africa to Namibia. Another example is the cession of Alaska to the United States for 7.2 million US dollars by Russia in 1867.

Nowadays, the cession of territory is restricted by the right to self-determination and the prohibition on the use of force. Egypt ceded two islands to Saudi Arabia,⁷⁸⁸ but the cession was quashed by a court in Egypt.⁷⁸⁹ The decision of the Egyptian leader was most probably illegal given that the Egyptian people did not consent to the cession of the two islands. The right to self-determination prevents the leader of one state to cede part of the national territory to another state without the consent of the ceding state's people.⁷⁹⁰ Furthermore, the prohibition on the use of force makes it difficult, if not impossible, for a vanquished state to 'cede' its territory to the victorious state.

⁷⁸⁴ Imseis op cit 1.

⁷⁸⁵ Brownlie op cit 149.

⁷⁸⁶ Imseis op cit.

⁷⁸⁷ The most notable is Germany's loss of her colonies, and part of its own territory. However, this is the only significant case, other areas also lost significant parts of their territories.

⁷⁸⁸ Egypt ceded the Red Sea islands of Tiran and Sanafir to Saudi Arabia under a maritime border demarcation agreement. Available at <http://www.al-monitor.com/pulse/originals/2016/05/egypt-halayeb-shalateen-border-dispute-sudan-saudi-tiran.html#ixzz4m08cWX00>.

⁷⁸⁹ Michaelson, 'Egyptian court quashes deal to transfer Red Sea islands to Saudi Arabia' *The Guardian* (21 June 2016) Available at <https://www.theguardian.com/world/2016/jun/21/egyptian-court-quashes-transfer-red-sea-islands-saudi-arabia>.

⁷⁹⁰ *ibid*.

5.6 Prescription

In international law, prescription is a notion that is difficult to wrap around one's head.⁷⁹¹ Judicial precedents avoid the term 'prescription' or 'acquisitive prescription'. Moreover, while most jurists accept prescription as a mode of acquisition, a number of great jurists have rejected it.⁷⁹² For example, Sharma reckoned that acquisitive prescription is "still a principle of a very doubtful juridical status."⁷⁹³ Nevertheless, even the sceptics support the principle's effect or consequences in that they accept that territory can be acquired after a long period of effective possession of the territory.

In doctrinal writings, there are at least three forms of prescription:

- Immemorial prescription – This title occurs when the origin of the title is uncertain, but presumed to be legal, though it may not have been legal. Some jurists deny that such a title is part of acquisitive prescription.⁷⁹⁴

- *Usucapio* – title applied under conditions of bad faith.⁷⁹⁵

- Prescription under conditions similar to *usucapio* in Roman law: uninterrupted possession, good faith, and the continuance of possession for a certain length of time.⁷⁹⁶

Jurists use the word 'prescription' to describe two situations:⁷⁹⁷ activities competing for the same (part of) territory and acceptance by the displaced competitor.⁷⁹⁸ That is, the term first describes conduct of State A and State B, both staking claims that they possess title to the same territory; it then describes the acceptance by either State A or State B that the other claimant placed the stronger claim to the disputed territory.

⁷⁹¹ R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 20.

⁷⁹² Brownlie op cit 151.

⁷⁹³ S.P. Sharma, *Territorial Acquisition, Disputes, and International Law* (Martinus Nijhoff 1997) 168.

⁷⁹⁴ Brownlie op cit 151.

⁷⁹⁵ *ibid.*

⁷⁹⁶ *ibid.*

⁷⁹⁷ *ibid* 152.

⁷⁹⁸ *ibid* 152- 153.

There are two requirements for prescription, namely that possession must be exercised as a sovereign and that possession must be peaceful and uninterrupted.⁷⁹⁹ Therefore, for prescription to be valid, the possession must be long continued, undisturbed, and it must be unambiguously attributable to a claim to act as sovereign. It depends as much on the quiescence of the former sovereignty as on the consolidation through time of the new.⁸⁰⁰

The *Kasikili/Sedudu* Island case⁸⁰¹ is an example of acquisitive prescription. In that case, the court stated that territory is acquired by prescription where there is peaceful, public and uninterrupted possession that lasted for a certain time.

Though occupation and prescription are different, they both amount to “rationalizations of effective possession and control”.⁸⁰² Acquisitive prescription claims arise when the original title to a territory cannot be found.⁸⁰³ In such cases, the court must determine who of two or more claimants has a stronger claim to the territory.

5.7 Estoppel

The doctrine of estoppel applies to the acquisition of territory under international law.⁸⁰⁴ Estoppel, also known as ‘preclusion’, prevents a state that has recognized the acquisition of part of its territory by another state to dispute that other state’s title to the territory in question.

In the years leading up to the independence of Namibia, it was argued that South Africa had administered Walvis Bay in a way that

⁷⁹⁹ C. Schofield op cit 5.

⁸⁰⁰ *ibid* in Jennings and Watts, eds. *Oppenheim’s International Law* (9th edn. Vol. 1, Longman 1992) 23.

⁸⁰¹ See International Court of Justice, Icj/594, ICJ, *Finds that Kasikili/Sedudu Island forms part of Territory of Botswana*, 13 December 1999. Also M. N. Shaw and M. D. Evans, ‘Case concerning Kasikili/Sedudu Island (Botswana/Namibia)’ (2000) 49, 4 *The International and Comparative Law Quarterly* (Cambridge University Press) 964-978. Available at <http://www.jstor.org/stable/761773>.

⁸⁰² Dugard op cit 139.

⁸⁰³ B. T. Sumner, ‘Territorial Disputes at the International Court Of Justice’ 1787. Available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1227&context=dlj>. Many scholars believe that under international law, effective control is the shibboleth—indeed, the *sine qua non*—of a strong territorial claim.

⁸⁰⁴ See O. W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence* (1957).

led the international community to believe that Walvis Bay was an integral part of Namibia.⁸⁰⁵ Dugard disputes this claim on the basis that South Africa's conduct did not meet the requirements for the operation of the estoppel doctrine.⁸⁰⁶ However, it could always be argued that the real basis for Namibia's claim over Walvis Bay lies in cession, not estoppel.

6. The Sedudu/Kasikili islands dispute

Kasikili/Sedudu island case is a stellar example of inter-state territorial disputes in the Namibian context.⁸⁰⁷ On 17th May 1996, Namibia and Botswana jointly filed a submission to the ICJ requesting that the Court settle a boundary dispute between the two nations involving the Kasikili/Sedudu Island. (The 3.5km² island was known in Namibia as 'Kasikili' and in Botswana as 'Sedudu') Accompanying the request was a Special Agreement signed the 15 February 1996 which made reference to the Anglo-German Treaty of July 1890 which established an agreement between the colonial powers (Great Britain and Germany) on their respective spheres of power and influence over the two African nations.⁸⁰⁸ On the grounds of that treaty and the principles of international law, the parties requested the Court to determine the "boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island".⁸⁰⁹

The 1890 Treaty locates the dividing line between the spheres of influence of Great Britain and Germany in the "main channel" of the River Chobe. Yet the Treaty does not define the notion of "main channel. Hence, for the ICJ, *the real question to be answered concerns the location of that main channel*. Botswana submitted that the main channel is the one running north of Kasikili/Sedudu Island. Namibia, for its

⁸⁰⁵ See 'Namibia, South Africa, and the Walvis Bay Dispute' (1980) The Yale Law Journal Company, Inc. 903 – 922. Available at <http://www.jstor.org/stable/796090>.

⁸⁰⁶ Dugard op cit 141.

⁸⁰⁷ See International Court of Justice, Icj/594, ICJ, *Finds that Kasikili/Sedudu Island forms part of Territory of Botswana*, 13 December 1999.

⁸⁰⁸ *Anglo-German Agreement of 1890*.

⁸⁰⁹ *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* ICJ Reports, 1996.

part, argued that the main channel is the one running south of the island.

The court considered, among other things, the depth, the width, the flow (that is, the volume of water carried by the channel), and the navigability of the channel. It also considered the figures submitted by the parties, relevant surveys. In the end, the Court concluded that “the northern channel of the River Chobe around Kasikili/Sedudu Island constitutes the main channel. Put another way, the court agreed with Botswana’s arguments.

The Court ruled, by eleven votes to four, that the boundary follows the Chobe River around the island and that the island forms part of the territory of Botswana. The island’s fate was thus decided based on its geographical location.

Note that the ICJ said that it could not draw conclusions from the cartographic material “in the absence of any official map expressing the intentions of the parties to the 1890 Treaty” and “in the light of the uncertainty and inconsistency” of the maps submitted by the parties.

Namibia made an alternative argument, founded on the acquisitive prescription discussed above. The ICJ, however, rejected Namibia’s alternative submission. The ICJ’s decision on Namibia’s alternative submission is questionable. It appears from the facts that Namibia and its predecessors had occupied and exercised sovereign jurisdiction over Kasikili with the knowledge and acquiescence of Botswana since at least 1890.

STATE RESPONSIBILITY

Earlier I said that, together with sources of international law and dispute resolution, state responsibility is one of the cornerstones of international law. State responsibility is the primary legal basis for the enforcement of international law.⁸¹⁰ It emanates from state sovereignty and the equality of states.⁸¹¹

‘Internationally wrongful acts’ are the object of the international law on state responsibility. At the level of international law, the notion that comes closest to internationally wrongful acts in municipal is delict (or tort).⁸¹² Initially, the thinking was that violation of any international law obligation would create a duty on the guilty state to make reparations. It did not matter whether the violation was contractual or tortious (i.e., delictual in nature).⁸¹³

Today, the law of state responsibility is better conceived as covering the area of ‘delict’ in international law.⁸¹⁴ It is, however, important to emphasize that state responsibility and delict are not quite the same, though similar. In the *Rainbow Warrior* arbitration, the tribunal observed that “in the international law field there is no distinction between contractual and tortuous responsibility”. With regard to the sources of the legal obligations breached, there is a single regime of state responsibility in international law, as opposed to domestic legal systems where distinctions exist between delict and contract.⁸¹⁵

⁸¹⁰ A. Nissel, ‘The Duality of State Responsibility’ (2013) 44 Columbia Human Rights Law Review 793, 795.

⁸¹¹ M. Shaw, *International Law* (6th edn Cambridge University Press 2008) 694.

⁸¹² In the law of obligations in Namibia, a wrong committed by one private person to another private person is called a ‘delict’. In most other common-law jurisdictions and in England, it is called ‘tort’.

⁸¹³ M. Shaw op cit 695,

⁸¹⁴ H. Kelsen, *The Principles of International Law* (The 123 Lawbook Exchange Ltd. 2003) 19.

⁸¹⁵ See D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell) 432.

Internationally wrongful act should be contrasted with international crime. In the former case, states incur responsibility. In the case of international crimes, individuals are personally accountable for these acts. It is, however, not yet clear whether states, as distinct from individuals, can incur responsibility for international crimes.

The field of state responsibility is confronted with a host of challenges. Chief among these, is the non-binding nature of the ‘codified’ rules on state responsibility. This non-binding character of the rules in question has created a mechanism for states to bypass them – when they do not reflect customary international law – and, thus, leads to a situation where courts and states may, depending on the circumstances, apply different legal regimes for state responsibility, sometimes inconsistently.⁸¹⁶ Effectively, states do not agree either on the form or content of the state responsibility doctrine.⁸¹⁷ Notably, the Anglo-American perspective based on US investment arbitrations clashed with the perspective of lawyers from Germany and struck lawyers from Latin America as ‘imperialistic’.⁸¹⁸

Another challenge is the responsibility of states for acts, say a cyberattack, performed through the Internet. Rules regulating responsibility in such cases are still at an embryonic stage.⁸¹⁹ Another challenging development in the field is the responsibility, if any, of states for terrorist acts perpetrated by non-state actors. Here, as Travalio and Altenburg said, successful counterterrorism responses require “the accountability not just of the terrorists that perpetrate these atrocities but also of the states that are charged to protect individual citizens against them.”⁸²⁰ That is, the two authors hold the

⁸¹⁶ See A. Nissel, ‘The Duality of State Responsibility’ (2013) 44 *Columbia Human Rights Law Review* 793–845; see also A. Nollkaemper, ‘Constitutionalisation and the Unity of the Law of International Responsibility,’ (2009) 16 *Indiana Journal of Global Legal Studies* 535.

⁸¹⁷ A. Nissel *op cit* 852. See also J.R. Crawford, ‘State Responsibility’ (2006) paragraph 65 in *Max Planck Encyclopedia of Public International Law*, Available at <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093>> Last accessed 22 October 2018.

⁸¹⁸ A. Nissel *op cit* 795.

⁸¹⁹ See J. Kurbalija, ‘State Responsibility in Digital Space’ (2016) 26 *Swiss Review of International and European Law* 307.

⁸²⁰ G. Travalio and J. Altenburg, ‘State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of

debatable view that states should be responsible for terrorist acts that occur within their territories.

Immediately following the next section, I divided this chapter on state responsibility in three substantive parts. In the first, I tackle the *direct* responsibility of states for internationally wrongful acts. In the second part, I turn to the *indirect* responsibility of states for those acts – a responsibility captured by the expression ‘diplomatic protection’. The last section of the chapter deals with the responsibility of international organizations.

1. Basic distinctions

1.1 Direct versus indirect state responsibility

State responsibility may be direct or indirect. Direct state responsibility arises when a state acts directly through its agents or organs and violates duties it owes to another state under international law. Indirect state responsibility occurs when a state injures the person or property of a foreign national.⁸²¹ A state is entitled to expend diplomatic protection when the respondent State injured the person or property of its national. By injuring the person or property of such foreign national, the state is deemed to have injured the state of nationality of the injured person.⁸²²

A case may be ‘mixed’ in the sense that it involves both direct and indirect state responsibility. In *US Diplomatic and Consular Staff Tehran Case*,⁸²³ in February 1979, the Shah of Iran and his government were toppled by the Islamic Revolutionary Government. On November 1979, Iranian security forces fled from the scene where several hundred Iranian students were demonstrating following news that the US admitted the deposed Shah of Iran into US territory for

Military Force’ (2003) 9 Chinese Journal of International Law 106 and 109; see also E. Nielsen, ‘State Responsibility for Terrorist Groups’ (2010) 17 U.C. Davis Journal of International Law and Policy 151 and 189.

⁸²¹ M. Lehto, *Indirect Responsibility for Terrorist Acts* (Martinus Nijhoff Publishers 2009) 239.

⁸²² *Mavrommatis Palestine Concessions Case (Greece v U.K.)*, Jurisdiction, P.C.I.J. Reports, Series A, No. 2, 12. See also F. Garcia-Amador, *et al*, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana Publications 1974) 1.

⁸²³ *U.S. Diplomatic and Consular Staff Tehran Case (U.S. v Iran)*, I.C.J. Reports 1980, 3.

medical reasons. The demonstrators seized the US embassy in Tehran by force and detained 52 U.S. nationals: 50 diplomatic or consular staff and 2 private citizens. Iran was directly responsible for the acts (or omission) of its security forces vis-à-vis the US embassy and its personnel and indirectly responsible for the detention of the two private US nationals. Though the ICJ treated this incident as involving direct state responsibility, it was actually a case of mixed direct and indirect responsibility. In mixed cases, it is often difficult to determine whether the claim is (predominantly) direct or indirect.

1.2 Primary versus secondary rules of state responsibility

Rules regulating state responsibility may be primary or secondary. Italian jurist Roberto Ago is credited with this well-established dichotomy.⁸²⁴ In 1963, he became Special Rapporteur at the International Law Commission (ILC), which was then charged with the codification of the rules on state responsibility.

The difference between these primary and secondary rules of state responsibility is similar to the difference between substantive rules and procedural rules.⁸²⁵ Primary rules are first-order norms of state responsibility (i.e., content). They are rules on how states must act or not act. Secondary rules, on the other hand, are second-order norms of state responsibility (i.e., process). They are rules on circumstances where a state incurs responsibility for internationally wrongful acts.⁸²⁶ Secondary rules apply to both direct and indirect state responsibility. Special Rapporteur Roberto Ago confined the codification of state responsibility to secondary rules.⁸²⁷

The distinction between primary and secondary rules of state responsibility is not always clear. In the *Rainbow Warrior* arbitration, New Zealand argued that France breached a treaty obligation (i.e., it breached substantive rules of state responsibility) by removing from New Zealand two French agents convicted of destroying a civilian ship docked in New Zealand. France countered that only the law of

⁸²⁴ A. Nissel op cit 835-836.

⁸²⁵ J. Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 216.

⁸²⁶ J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002) 14.

⁸²⁷ J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 271.

state responsibility, that is, secondary rules of state responsibility applied and that France should be exonerated on account of *force majeure* and distress, as provided for in the (secondary) rules of state responsibility.⁸²⁸

The tribunal decided that the rules of international law relating to treaties applied, but that the (secondary) rules of state responsibility, as provided for in customary international law, applied to the consequences of a breach of a treaty.⁸²⁹ These rules of state responsibility include the circumstances when wrongfulness is excluded and remedies for breach.⁸³⁰

The importance of this difference lies in the fact that substantive rules regulating the behaviour of state are provided for in other areas of international law whereas the rules regulating the procedural aspects of state responsibility are dealt with in the 2001 International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts – the focus of this chapter.

The emphasis of this chapter and of state responsibility as a branch of public international law is on the second-order, secondary or procedural rules. These second-order norms relate to the procedural rules and the consequences from breach(es) of the substantive rules of international law.⁸³¹

2. Responsibility of states

2.1 The multi-track doctrine of state responsibility

As you have realized by now, state responsibility is a highly complex area of international law. In part because of the relative novelty of the rules on state responsibility, as codified in 2001 in the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts, states apply different doctrines of state responsibility. This multi-track nature of the application of state responsibility rules adds to the complexity of this central field of international law. Not only are the codified rules on state responsibility different from those that apply to foreign

⁸²⁸ *France-New Zealand Arbitration Tribunal*, 82 I.L.R. 500 (1990).

⁸²⁹ 82 ILR, PP.499, 551.

⁸³⁰ *ibid.*

⁸³¹ Special Rapporteur Roberto Ago decided that the

investments; inconsistencies with regard to both liability rules for determining compensation for injury and the constitutionalisation of state responsibility rules in domestic legal system need further clarification. State responsibility in foreign investment evolved from the diplomatic protection of nationals abroad to the crystallization of arbitral practice.⁸³² Under the codified rules (for example, the Draft Articles), on the other hand, state responsibility resembled rules on state responsibility in domestic legal systems: standing, imputation, justification, remedies, etc.⁸³³

The rules of state responsibility are *procedural* in nature and may therefore conflict with the procedural rules on state responsibility in municipal law.⁸³⁴ For instance, national legislation may exempt the state from liability for injuries caused by a state-owned enterprise, but under international law the state bears the responsibility for the actions of state-owned enterprises.

The main justification of this state of affairs is to be found in the historical evolution of the rules on state responsibility. Nissel is one of the few jurists to research the history of the state responsibility doctrine. In 2013, he observed that, while international law has existed for centuries, the rules on state responsibility is a recent phenomenon.⁸³⁵ Before the 20th century, the term ‘state responsibility’ had no technical meaning.⁸³⁶ The reasons for this situation are that there was hardly any history of the field, that the codification of state responsibility took more than seven decades, and that the idea of state responsibility has a certain obviousness.⁸³⁷ It seemed that international responsibility had been around for as long as international law had.⁸³⁸

According to Nissel, the rules on state responsibility display a dual structure. Those rules evolved from two 19th-century practices: The U.S. protection of foreign investments and the German

⁸³² A. Nissel op cit.

⁸³³ *ibid.*

⁸³⁴ A. Nollkaemper, ‘Constitutionalisation and the Unity of the Law of International Responsibility’ (2009) 16 *Indiana Journal of Global Legal Studies* 535.

⁸³⁵ A. Nissel op cit 795-796.

⁸³⁶ *ibid* 795.

⁸³⁷ *ibid.*

⁸³⁸ *ibid.*

doctrinalisation of public law.⁸³⁹ Ultimately, however, the codified rules on state responsibility were not based on the US practice in commercial arbitration (i.e., the protection of foreign investments), but on German public law doctrine, although the two can be seen as complementary.⁸⁴⁰ As a consequence, at least two legal regimes run side by side, as far as state responsibility and the enforcement of international law are concerned: the codified rules on state responsibility based on German doctrine and the rules on state responsibility in investment arbitration based on US practice.

Another consequence is that the codified rules on state responsibility do not apply to foreign investments. In a nutshell, codified rules cover disputes between states whereas foreign investment rules address disputes between states and foreign investors, the overwhelming majority of whom are private, non-state actors.

2.2 The nature of state responsibility

The two core functions of state responsibility are to ensure (1) the rule of law and global order through the enforcement of the rules of international law, and (2) reparation for injury.⁸⁴¹ The essential features of state responsibility may be summed up by (1) the existence of a legal obligation, (2) a violation of that obligation, and (3) a resulting loss or damage.⁸⁴² In other words, for state responsibility to arise a legal obligation on states must have existed, a state must have breached that obligation, as a result of which another state or other states have suffered a loss or damage.

These essential characteristics of state responsibility have been confirmed by the very first article of the Draft Articles on the Responsibility of State, a number of leading cases⁸⁴³ and widespread state practice in international law. Article 1 of the Draft Articles lays down that “every wrongful act of a state entails responsibility.” In the *Spanish Zone of Morocco*, it was held that:⁸⁴⁴

⁸³⁹ *ibid* 795-796.

⁸⁴⁰ *ibid* 796, 850-851.

⁸⁴¹ A. Nollkaemper *op cit* 535.

⁸⁴² G. Tunkin, *Theory of International Law* (Harvard University Press 1974) 386.

⁸⁴³ For example, *Corfu Channel, Merits*, I.C.J. Reports 1949, 4, at 23.

⁸⁴⁴ 2 RIAA, 641.

Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.

There are debates as to whether states are strictly liable for wrongful acts, whether or not they are at fault, or whether they should be liable only when fault is established.⁸⁴⁵ The principle of objective responsibility, also known as ‘risk theory’, holds that the responsibility of states is strict whereas the principle of subjective responsibility, also known as the ‘fault theory’, holds that states are liable for wrongful acts only when fault is proved.⁸⁴⁶ According to the fault theory, states are liable for any injury caused only when an element of intention (*dolus*) or negligence (*culpa*) has been proved.⁸⁴⁷ The existing rules on state responsibility in international law appear to favour the risk theory. I subscribe to the risk theory because the risk theory encourages agents of the state to ponder the consequences of their actions and because it obviates the heavier burdens that would fall on plaintiffs’ shoulders to prove the ‘intention’ of the state. Anyhow, when injured states can produce it, proof of intention could always inform judges’ assessments of the reparations that the state should pay to the injured states.

2.3 The Draft Articles on State Responsibility

The International Law Commission (ILC) commenced its work on state responsibility in 1956. It was not until 2001 that the ILC, under the leadership of special rapporteur James Crawford (now a judge of the International Court of Justice), adopted a set of 59 draft rules on state responsibility.⁸⁴⁸ Thus, it took almost half a century for the ILC to come up with these Draft Articles on State Responsibility.⁸⁴⁹ Despite lingering misgivings about its provisions at the time of its adoption, the Draft Articles represent to a large extent

⁸⁴⁵ A. Cassese, *International Law* (Oxford University Press) 246.

⁸⁴⁶ M. Shaw op cit 698.

⁸⁴⁷ *ibid*.

⁸⁴⁸ A. Pellet, *The ILC’s Articles on State Responsibility for Internationally Wrongful Acts and Related Texts*, (2016) 78. Retrieved from <http://pellet.actu.com>. Last accessed on 4 April 2017.

⁸⁴⁹ W. Slomanson, *Fundamental Perspectives on International law* (6th ed, Wadsworth Cengage Learning) 75.

a codification of rules of customary international law on state responsibility.⁸⁵⁰

Some provisions of the Draft Articles are innovations.⁸⁵¹ For instance, rules on serious breaches of peremptory norms. These innovations partly account for the fact that the Draft Articles have not yet been turned into a binding treaty. Different parties and states have settled for a restatement of the rules of customary international law with regard to state responsibility, as opposed to rules on state responsibility cast in a binding treaty. It therefore follows from the above that, whenever you want to know whether a certain act violates or complies with certain provisions of the Draft Articles, you must also ascertain whether those provisions are part of customary law or based on what the ILC thought would be desirable, i.e., *lex ferenda*.

2.3.1 Internationally wrongful acts

State responsibility is one of the core areas of international law. It arises whenever a state breaches a treaty or an obligation that it owed to one state, some states, or all states.⁸⁵² In short, a state incurs responsibility whenever it breaches its obligations under international law. Such breaches are referred to by the phrase ‘internationally wrongful act’. That notion sits at the heart of the ILC Draft Articles on State Responsibility.

2.3.2 Serious breaches of higher norms

The rules on state responsibility do not apply to internationally wrongful acts only. Although the ILC Draft Articles adopted in 2001 confine themselves to delictual responsibility, the drafters of the Draft Articles recognize that there is a set of higher norms that deserve greater protection when violations of such norms are serious. Those higher norms are peremptory norms of international law (*ius cogens*) and obligations owed to all states or the international

⁸⁵⁰ See F.L. Bordin, ‘Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law’ (2014) 63 International and Comparative Law Quarterly 535.

⁸⁵¹ S. Rosenne, *The International Law Commission’s Draft Articles on State Responsibility: Part 1* (Martinus Nijhoff Publishers) 28.

⁸⁵² Cassese op cit 258.

community (obligations *erga omnes*).⁸⁵³ Peremptory norms include the right to self-determination and provisions prohibiting aggression, slavery, genocide, torture, racial discrimination and apartheid.⁸⁵⁴

Articles 40 and 41 impose the obligation on states to cooperate to put an end, through lawful means, to violations of peremptory norms and to deny recognition of any situation brought about in violation of such norms.⁸⁵⁵

A breach or violation of these higher norms is ‘serious’ when ‘it involves a gross or systematic failure by the responsible state to fulfil the obligation’.⁸⁵⁶ These provisions on serious breaches of higher norms are contested,⁸⁵⁷ but they enjoy increasing acceptance in both doctrinal writings and judicial precedents.

2.3.3 Attribution of conduct to a state

The very first article of the Draft Articles lays down that ‘[e]very internationally wrongful act of a State entails the international responsibility of that State.’⁸⁵⁸ Before a state can be held responsible for an internationally wrongful act, it must be established that (1) the conduct or act in question has been performed or committed by that state, and that (1) the conduct or act constitutes a breach of an obligations under international law. In other words, the conduct or act must amount to an internationally wrongful act and must be attributed or attributable to a state.

Article 4(1) of the Draft Articles provides a test for the attribution of conduct to a state:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization

⁸⁵³ S. Yee and J. Morin, *Multiculturalism and International Law* (Martinus Nijhoff Publishers) 140.

⁸⁵⁴ International Law Commission Commentary on Article 40 of the Draft Articles.

⁸⁵⁵ A. Pronto and M. Wood, *The International Law Commission 1999* (Oxford University Press 2010) 298.

⁸⁵⁶ International Law Commission Draft Article 40 (2).

⁸⁵⁷ J. Dugard op cit 278.

⁸⁵⁸ International Law Commission Draft Article 1(1).

of the State, and whatever its character as an organ of the central government or of a territorial unit of the State

From this definition, it is evident that a federal state is responsible for the acts of its constituents, be their regions, provinces, or federated states.

Also considered as acts attributable to the state, are acts performed by organs that are not part of the state but that nonetheless exercise some aspects of state power.⁸⁵⁹ Examples of such entities include state-owned enterprises (also known as parastatal). Similarly, states are responsible for the conduct of government employees acting within the scope of their employment.

Generally, states are not responsible for the conduct of private persons. However, states are responsible for the conduct of private persons where there is special relationship between those private persons and the state.⁸⁶⁰ Article 9 of the Draft Articles lays down that conduct of a group of persons may be attributed to the state if the group was performing elements of government authority in the absence of government officials.

The *Case Concerning United States Diplomatic and Consular Staff in Tehran*⁸⁶¹ illustrates the proposition that a state may become responsible for the acts of private persons under certain circumstances. A suit was filed against Iran in arbitral tribunal in The Hague by people with dual Iranian-U.S. citizenship under a Claim Settlement Declaration, which was part of the Algiers Accords reached in the aftermath of the 1979 Iranian seizure of U.S. diplomatic and consular personnel in Iran as hostages. Iran challenged the jurisdiction of the tribunal. Another question raised by Iran was whether the detention, hostage taking and seizure of U.S. diplomatic and consular members by Iranian militants were attributable to Iran. The Iranian government was aware of the events but still failed to prevent the hostage taking in violation of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. A decision by the ICJ in favour

⁸⁵⁹ L. Yarwood, *State Accountability under International Law* (Routledge 2011) 18.

⁸⁶⁰ J. Crawford op cit 94.

⁸⁶¹ *United States v Iran, Judgment of 24 May 1980*, I.C.J. Reports 1980, 3.

of the U.S. was passed. Iran was found liable for the actions of the Iranian militants.

In the same vein, Article 10 provides that the acts of an insurrectional movement that eventually becomes the government representing the state will be attributed to the state under international law. This provision reshapes international law by attaching an exception to the well-established principle spelled out in *Solis* that no state is responsible for the conduct of rebellious movements committed in defiance of its authority, where it is itself not guilty of any breach of good faith, or not negligent in quelling the insurrection.⁸⁶²

2.3.4 Invocation of the responsibility of a state

The general principle is that one state may invoke the (delictual) responsibility of another state for a violation of an obligation owed to it by that other state or owed to a group of states to which the one state belongs and that is particularly affected by that violation.⁸⁶³ A state may invoke the responsibility of another state by filing a claim to that effect or by commencing legal action against that state.

Article 48(1) of the Draft Articles provides that any state is entitled to invoke the responsibility of another state (a) if the obligation breached is owed to a group of state under specified circumstances, and (b) if the obligation breached is owed to the international community as a whole. This provision means that a state that is not itself injured by a breach of an international obligation may nonetheless invoke the responsibility of a state committing such wrongful act if the act breaches an obligation owed to a group to which the innocent state belongs or to the entire international community. This provision is inspired by the 1966 decision in South West Africa cases.⁸⁶⁴ This is an important way in

⁸⁶² R.I.A.A., (1928) IV, 358 at 361 (relying on *Home Missionary Society*, R.I.A.A., (1920) VI, 42.

⁸⁶³ International Law Commission Draft Article 42.

⁸⁶⁴ *The SWA cases* second phase; the court had to decide on the argument of necessity. The crux of this was that since the Council of the League had no means of imposing its views on the Mandatory, and since no advisory opinion it might receive from the court would be binding on the latter the Mandate could have drifted at will. Therefore, it was argued as an ultimate safeguard of for the sacred trust, that each member of the League should have a legal right or interest in the

which Namibia participated in the development of international law. In the 1966 *South West Africa cases* decision, the court held that Liberia and Ethiopia had no legal standing to bring a claim against South Africa with regard to the latter's treatment of the people of Namibia because that treatment did not directly affect Liberia or Ethiopia. The court further held that international law did not recognize an *actio popularis*, that is, a right held by any member of the international community to institute legal proceedings 'in vindication of a public interest.' This decision by the ICJ generated a great deal of criticisms.⁸⁶⁵ In response, the Draft Articles adopted the principle that a state not directly injured by an internationally wrongful act may nonetheless invoke the responsibility of the guilty state. If this principle existed at the time of the 1966 *South West Africa cases*, Ethiopia and Liberia would have been legally entitled to thrust a claim against South Africa on behalf of South West Africa/Namibia.

2.3.5 Circumstances excluding wrongfulness

An act that is otherwise an internationally wrongful can nonetheless be deemed lawful in international law under certain circumstances. Circumstances excluding wrongfulness are:⁸⁶⁶

1. consent by the injured state;⁸⁶⁷
2. self-defence in compliance with the provisions of the Charter of the United Nations;⁸⁶⁸
3. countermeasures in response to an illegal act;⁸⁶⁹

matter and be able to take direct legal action relative to it. Also, in an attempt to further finalise the matter of necessity it was sought that the court allow for a decision of *action popularis*, but because it was not recognised as a right under international law it could not be enforced. The court decided to deny the claims of Ethiopia and Liberia. Retrieved from

<http://www.refworld.org/cases/ICJ,4023a9414.html>. Last accessed 9 July 2017.

⁸⁶⁵ For example, *The South West Africa Cases*, (1967) 1967 *Washington University Law Quarterly* 159, 200-201 (criticizing the ICJ for, among other things, withdrawing from the case on a mere procedural point).

⁸⁶⁶ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006) 170.

⁸⁶⁷ Article of 20 of the ILC Draft Articles on State Responsibility, 2001.

⁸⁶⁸ Article of 21 of the ILC Draft Articles on State Responsibility, 2001.

⁸⁶⁹ Article of 22 of the ILC Draft Articles on State Responsibility, 2001.

4. *force majeure* (i.e., ‘the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state’);⁸⁷⁰
5. circumstances where the ‘author of the act in question has no other reasonable way in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care’;⁸⁷¹ and
6. necessity.⁸⁷²

Necessity is the most controversial defence as it is not easy to determine whether a situation falls under the definition of necessity. In addition, necessity is seldom available to states because, unlike consent, self-defence and countermeasures, it does not require prior conduct from the injured state.⁸⁷³ Necessity is also exceptional because, in theory, it extends to situation where a state acts in defending the interests of the international community, as opposed to individuals within the state invoking that defense.⁸⁷⁴

Consent featured prominently in the *Likany* judgment of the Namibian Supreme Court.⁸⁷⁵ Unfortunately, Namibia’s highest court misunderstood ‘consent’ as a circumstance excluding the wrongfulness of an alleged internationally wrongful act. The court faced the question whether the High Court of Namibia was competent to try treason accused in violation of international law. On the principle under scrutiny, the Supreme Court correctly ruled that the High Court lacked competence to try accused dragged before it in violation of international law. However, the Supreme Court erred when it held that the arrest of accused persons on the territory of another state (i.e., Botswana), even if that state consented to the arrest, violated international law. As Frank, the only dissenting judge in that case pointed out, consent excuses an otherwise internationally wrongful act.

⁸⁷⁰ Article of 23 of the ILC Draft Articles on State Responsibility, 2001.

⁸⁷¹ Article of 24 of the ILC Draft Articles on State Responsibility, 2001.

⁸⁷² Article of 25 of the ILC Draft Articles on State Responsibility, 2001.

⁸⁷³ Commentary on Article 25 Article of 20 of the ILC Draft Articles on State Responsibility, 2001.

⁸⁷⁴ *ibid.*

⁸⁷⁵ *S v Likany* 2017 NR (3) 771 (SC).

2.3.6 Legal consequences of internationally wrongful acts

Once it is found that an act breached an international obligation of a state, that it is attributable to that state, and that the responsibility of that state has been invoked, the consequences of such internationally wrongful act must be determined.⁸⁷⁶ The legal consequences of an internationally wrongful act are twofold.⁸⁷⁷ First, the state must cease the act in question if it is continuing or offer assurances and guarantees of non-repetition if it has already been completed.

Second, the state must make full reparation.⁸⁷⁸ A breach of an international law obligation gives rise to a duty on the guilty state to make reparation.⁸⁷⁹ Similarly, in the *Case Concerning the Factory at Chorzów*, the court held that

[...] it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation... the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.⁸⁸⁰

The Draft Articles provides for three kinds of reparation, namely restitution, compensation and satisfaction.⁸⁸¹ Restitution occurs when a state that has committed a wrongful act restores the situation that existed before it committed the wrongful act.⁸⁸² Compensation refers to the payment of financially assessable damages. Satisfaction consists in the acknowledgment of the breach of international law,

⁸⁷⁶ United Nations, Yearbook of the International Law Commission (2001) 2.2 (United Nations Publications) 31.

⁸⁷⁷ J. Weiler, *et al*, *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter 1989) 115.

⁸⁷⁸ Article of 31 of the ILC Draft Articles on State Responsibility, 2001.

⁸⁷⁹ V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Martin Nijhoff Publishers 1990) 241.

⁸⁸⁰ *Case Concerning the Factory at Chorzów (Indemnity) (merits) (Germany v. Poland)*, Judgment of 13 September 1928, P.C.I.J. Reports, Series A, No. 17, 4.

⁸⁸¹ Article of 34 of the ILC Draft Articles on State Responsibility, 2001. See also A. De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry Into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International 1996) 138.

⁸⁸² See Article of 35 of the ILC Draft Articles on State Responsibility, 2001.

an expression of contrition and a formal apology.⁸⁸³ Note that, like in *Chorzów*, reparation can take the form of an indemnity.

The question of reparation is topical in Namibia in view of the claims that both the Namibian government and communities affected by the genocide of Hereros and Namas in 1904-1907 formally lodged. What are the prospects of success of their reparation claims? While there is a number of obstacles on their way to full reparation, the fact that the German parliament has officially recognized the genocide could help with regard to state responsibility and reparations.⁸⁸⁴

3. Diplomatic protection

Diplomatic protection arises in cases of indirect state responsibility.⁸⁸⁵ The rules on diplomatic protection and ‘the treatment of aliens’ have been codified by the International Law Commission (ILC) in 2006 in the Draft Articles on Diplomatic Protection.⁸⁸⁶ Those Draft Articles are, however, not binding as such.

The ILC Draft Articles on Diplomatic Protection defines ‘diplomatic protection’ as:

the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

That definition reflects customary international law.⁸⁸⁷ And, in the words of the ICJ,

⁸⁸³ S. Wolfe, *The Politics of Reparations and Apologies* (Springer 2014) 4.

⁸⁸⁴ J. Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908* (Praeger Security International 2009) 60.

⁸⁸⁵ M. Evans, *International Law* (3rd ed, Oxford University Press 2010) 456.

⁸⁸⁶ I.L.C. Draft Articles on Diplomatic Protection, 2006. Report of the 58th Sess. I.L.C. (2006) G.A.O.R. A/61/10, 22ff.

⁸⁸⁷ *Diallo Case*, I.C.J. Reports 2007, paragraph 39.

[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels.⁸⁸⁸

The basis for responsibility in those cases is the fact that the responsible state has injured the innocent state by injuring the person or property of a national of the innocent state. That principle was enunciated in the *Mavrommatis Palestine Concession Case*.⁸⁸⁹

The proposition that an injury to the person or property of a national of a state is an injury to that state itself is disputed in proceedings before international courts. Few states claim that they bring suit against the responsible states because they have been injured by the injury caused to their national(s); most states claim that they are litigating on behalf of their injured nationals, and not in their own name.⁸⁹⁰

Anyhow, diplomatic protection may result in arbitration awards or judicial decisions, though arbitral awards are much less common than heretofore.⁸⁹¹ In South Africa, the Supreme Court of Appeal in *Van Zyl* decided in 2008 that, for a claim of diplomatic protection to be successful, a plaintiff state must prove that:⁸⁹²

1. the injured person is its national;
2. all local remedies have been exhausted; and
3. the conduct of the defendant state is a violation of international law.

⁸⁸⁸ *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. Reports, Series A, No. 2, 12.

⁸⁸⁹ *ibid* (holding that “[b]y taking up the case of one of its subjects or by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law”).

⁸⁹⁰ See J. Dugard *op cit* 281 (observing that, when states commence legal action on behalf of their nationals, they rarely claim that they assert their own right and often describe the nationals as the ‘injured’ persons or the ‘claimants’).

⁸⁹¹ D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 503.

⁸⁹² *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at 314. See also C. Amerasinghe, *Local Remedies in International Law* (2nd ed, Cambridge University Press 2004) 22.

Whether Namibian courts will adopt these criteria remains to be seen. The criteria nonetheless look like a logical round-up of the applicable requirements for diplomatic protection in international law.

Note also that diplomatic protection is a right of the plaintiff state, not an obligation.⁸⁹³ That is, no rule of international law obliges a state to extend diplomatic protection to its nationals, nor can they force their home state to roll out such protection.

3.1 Nationality

A state is only entitled to extend diplomatic protection to its nationals alone.⁸⁹⁴ The key concept here is ‘nationality’. Although nationality and citizenship are treated as synonyms in popular imagination, the two are quite different. Nationality is a concept of international law whereas citizenship is concept of constitutional law in municipal law.⁸⁹⁵

The requirement of nationality is illustrated by the *Nottebohm* case. Mr. Nottebohm was a German national who settled in Guatemala where he established a successful business. His family, social and business ties were firmly established in Guatemala. During World War II, he occasionally visited Germany and his brother in Liechtenstein, a country that was not aligned during the War. Fearing that his nationality may become a problem should Guatemala declare war on Germany, Mr. Nottebohm naturalized as a Liechtenstein citizen. Although Liechtenstein required three years of residence in Liechtenstein as a requirement for citizenship by naturalization, it waived it in the case of Mr. Nottebohm. Later on, Mr. Nottebohm was arrested in the United States as an enemy alien. Liechtenstein brought a claim of diplomatic protection in favour of Mr. Nottebohm, but the court rejected the claim on the basis that they were not genuine connection between Liechtenstein and Mr.

⁸⁹³ See *Barcelona Traction, Light and Power Co. Case (Belgium v Spain)*, I.C.J. Reports 1970, 3 paragraph 99 (ruling that “the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it”).

⁸⁹⁴ H. Lauterpacht, *International Law* (Cambridge University Press 1997) 229.

⁸⁹⁵ H. Kelsen, *Principles of International Law* (The Lawbook Exchange LTD 2003) 252.

Nottebohm. The court did not deny the power of Liechtenstein or any state to lay down criteria for the acquisition of nationality, but denied that any real and genuine connection existed between Liechtenstein and Mr. Nottebohm.

The case appears to have been decided on wrong grounds. It is not for an international court or a court in any jurisdiction to second-guess the genuineness of connection between a state and its nationals. Article 4 of the Draft Articles does not require a plaintiff state to prove the genuineness of the connection between the state and its nationals. However, the *Nottebohm* case is not without relevance. It is relevant to situations where a person has dual or multiple nationalities. The situation becomes complicated when an injured person is a national of both the plaintiff state and the defendant state. In such cases, it appears that the state with which an injured person has both the nationality and the strongest connection will be able to bring a claim against the other state, of which the injured person is also a national.

A different set of rules applies to diplomatic protection in favour of corporations and their shareholders.⁸⁹⁶ Two issues arise. The first is whether a state is entitled to protect a corporation. The other issue is whether a state is entitled to protect shareholders, who in municipal law have legal personalities distinct and separate from that of a corporation.⁸⁹⁷ In the case *Barcelona Traction*, Belgium wanted to protect a corporation registered in 1911 in Canada on the basis that 88 percent of the shareholders were its nationals. The court held that the state where a corporation is registered (incorporated) is the state of nationality. It therefore rejected Belgium's claim.⁸⁹⁸

Article 9 of the Draft Articles on Diplomatic Protection likewise accept that incorporation endows a corporation with nationality, which then allows a state to protect that corporation: 'For the purposes of diplomatic protection of a corporation, the State of nationality means the State whose law the corporation was

⁸⁹⁶ A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 170.

⁸⁹⁷ O'Brien op cit 375.

⁸⁹⁸ *Barcelona Traction, Light and Power Co. Case (Belgium v Spain)*, I.C.J. Reports 1970, 3.

incorporated.’⁸⁹⁹ Article 9 also provides for an exception where the connection between the plaintiff state and the corporation is weak:

... when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

There are several exceptions to the provisions of Article 9 of the Draft Articles as well as the *Barcelona Traction* case. Those exceptions relate to cases where the corporate veil is lifted, which allow the state of nationality to intervene:

- where the state of the corporation’s nationality cannot act in the interest of the foreign shareholders because of the lack of connection between those shareholders and that state;
- where the rights of shareholders, as opposed to that of the corporation, are denied;
- where the corporation does no longer exist and, as such, has lost its separate legal personality; and
- where the state of the corporation’s nationality is responsible for the injury to the corporation and the shareholders have no other remedy than to call on their state of nationality, for example, expropriation of property rights by the host state in the case of foreign investments.

With respect to the latter exception, Article 11(b) lays down that:

A state of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

...

(b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing businesses there.

⁸⁹⁹ Article 9 of the ILC Draft Articles on Diplomatic Protection, 2006.

It is not clear whether the rule in Article 11(b) is part of customary international law. In *Diallo Case (Preliminary Objections)*,⁹⁰⁰ the ICJ left out that question.

In reaction against the many interventions of capital-exporting Western states in favour of their citizens in Latin America, some states in that region of America decided to insert Calvo clauses in contracts between the state and foreign investors. Named after Dr. Carlos Calvo, a 19th-century Argentine jurist, those clauses prevent those foreign states from intervening and extending diplomatic protection in disputes involving their nationals in contracts with the host states.

The doctrine aimed to prevent the abuse of developing countries by powerful ones.⁹⁰¹ It viewed the notion that foreigners merit higher protections than those accorded to nationals of the country where they reside as at odds with the equality of nations.⁹⁰² Article 9 of the 1933 Montevideo Convention on the Rights and Duties of States is an example of a Calvo clause:

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.

Those clauses could also be found in the constitutions of some Latin American countries, such as Mexico and Venezuela, where the doctrine became popular.⁹⁰³ The doctrine existed for several decades before economic difficulties in developing countries led them to abandon the doctrine.⁹⁰⁴

The ICJ observed in *Diallo* that the role of diplomatic protection for states in safeguarding the rights of corporate citizens and their shareholders has somewhat become less prominent because, in practice, recourse is only made to it in the very few situations where

⁹⁰⁰ *Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo)*, I.C.J. Reports 2007.

⁹⁰¹ ET Laryea, 'Rules for Entrenching Economic Dominance by Developed Countries,' in ET Laryea *et al* (eds.) *International Economic Law: Voices of Africa* (Siber Ink 2012) 97.

⁹⁰² *ibid.*

⁹⁰³ *ibid* 97.

⁹⁰⁴ *ibid* 99.

treaty regimes do not exist or have provide inoperative.⁹⁰⁵ Indeed, today, foreign investors are protected by bilateral and multilateral agreements for the protection of foreign investments as well as by contracts between states and foreign investors. This development means that the place for diplomatic protection has shrunk. What is more, bilateral and multilateral investment agreements create stronger protections because, unlike diplomatic protection, they are not discretionary and they provide foreign investors with rights that they can enforce.

3.2 Exhaustion of local remedies

The leading case for the requirement of exhaustion of local remedies is the *Interhandel Case*.⁹⁰⁶ In that case, where Switzerland took the matter to the ICJ after it failed to convince US courts to grant it the restitution of property belonging to one of its corporate nationals (i.e., Interhandel), the ICJ held that the requirement of exhaustion of local remedies is a rule of customary international law. Article 14(2) of the Draft Articles on Diplomatic Protection defines 'local remedies' as those remedies that are available to parties as of right before courts and administrative bodies.

Remedies that do not fall under that definition are not regarded as 'local remedies' for the purposes of the Draft Articles and the requirement of exhaustion of local remedies. States do not have to exhaust domestic remedies when a plaintiff state has been directly injured by the defendant state. Stated differently, in cases of direct injury or direct state responsibility, there is no duty on the injured state to exhaust domestic remedies. In cases involving both direct and indirect state responsibility, the Draft Articles provide that the court shall apply a preponderance test.

⁹⁰⁵ *Diallo Case (Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, I.C.J. Reports 2007, paragraph 88.

⁹⁰⁶ *Interhandel Case (Switzerland v. U.S.)*, 1959 I.C.J. 6 (Mar. 21).

4. Responsibility of international organizations

4.1. Introduction

Responsibility also attaches international organizations as internationally wrongful acts can be attributed to them.⁹⁰⁷ The area of responsibility of international organizations is relatively new. State responsibility must be distinguished from responsibility of international organizations both in terms of their substance and the source of that substance.⁹⁰⁸ In other words, the responsibility of states and the responsibility of international organizations have different rules and those rules emanate from different sources. In particular, the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001, only applies to responsibility of states as opposed to international organizations.

The responsibility of international organizations is regulated by norms set 10 years later by the ILC. It is in 2011 that the ILC adopted, under the leadership of special rapporteur Giorgio Gaja, the Draft Articles on the Responsibility of International Organizations. The 2011 Draft Articles on the Responsibility of International Organizations (DARIO) is modelled after the 2001 Draft Articles on the Responsibility of States.

The DARIO is based on the assumption or realization that international organizations have a distinct and separate legal personality from the states constituting them.⁹⁰⁹ In line with the decision in the *Reparations* advisory opinion, international organizations do not have the same general competence enjoyed by states. Put another way, states and international organizations do not have the same rights.⁹¹⁰ A state can invoke the responsibility of another state because that other state violated its territorial integrity whereas an international organization may not invoke the responsibility of a state in the same circumstances because international organizations do not own geographical territories.

⁹⁰⁷ K. Parlett, *The Law of International Responsibility* (Oxford University Press 2010) 222.

⁹⁰⁸ Rosenne op cit 271.

⁹⁰⁹ N. White, *The Law of International Organisations* (2nd ed, Juris Publishing 2005) 60.

⁹¹⁰ L. Clarke, *Public-Private Partnerships and Responsibility Under International Law: A Global Health Perspective* (Routledge 2014) 45.

4.2 Definition

International organizations can be defined in several ways. They can be defined in terms of:⁹¹¹

- their composition,
- the method of their establishment, and
- by implication from their separate juristic personality.

In terms of their composition, ‘international organization’ encompasses the traditional intergovernmental organization and organizations that include non-state entities and even other international organizations.⁹¹² In terms of their creation, an ‘international organization’ is established by a treaty. This is especially the case with the traditional intergovernmental organization. Lastly, an ‘international organization’ enjoys legal personality. Thus, informed by these three approaches, the DARIO defines an ‘international organization’ as ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.

International organizations may include as members, in addition to states, other entities.’ For instance, the European Union is in its own right a member of the World Trade Organization.

4.3 Sources of law

While the conduct of states is regulated by either international law or municipal law, the actions of international organizations are governed by three sources of law, namely international law, municipal law and *the rules of the international organization* in question.⁹¹³ This is a fundamental way in which the law on the responsibility of international organizations is substantively different from the law on the responsibility of states.

⁹¹¹ Giorgio Gaja, *Responsibility of International Organisations*. Retrieved from http://legal.un.org/ilc/documentation/english/a_cn4_532. Last accessed 4 July 2017.

⁹¹² *ibid.*

⁹¹³ W. Slomanson, *Fundamental Perspectives on International Law* (6th ed, Wadsworth Cengage Learning 2010) 123.

The rules of the international organization refer to two sources of law. First, the rules of the organization refer to the constituent instrument, that is, the constitution of the organization, which is typically found in the treaty establishing the given international organization. Thus, the rules of the United Nations (UN) are set out in the UN Charter. The rules of the organization also refer to the rules developed within the context of the work of the organizations, for instance, decisions, resolutions and regulations. To continue the example I have just used, the rules of the UN also come from the resolutions and recommendations of the Security Council and the General Assembly.

4.4 Attribution

As with the rules on state responsibility, the rules on the responsibility of international organizations revolve around the rules on attribution of conduct.⁹¹⁴ International organization incur responsibility primarily by attributing the conduct of its agents and organs to it. The rules on attribution of conduct to international organizations, as provided for in Chapter II of the DARIO, are similar to those on attribution of conduct to states, as provided for in the 2001 Draft Articles on States Responsibility.

International organisations generally enjoy various forms of immunity. That immunity is typically provided for in treaties regulating relations between international organisations and the states concerned or in municipal law.⁹¹⁵ It is, however, uncertain whether the immunity of international organisations can be regarded as a rule of customary international law. Wood argues that there is no general practice regarding organisational immunity that can be said to establish a customary rule of immunity.⁹¹⁶

If, in principle, international organizations are responsible for the acts of their agents, is the UN the UN responsible for abuses perpetrated by its peacekeepers? In 2016, reports of United Nations

⁹¹⁴ A. Nollkaemper, *Principles of Shared Responsibility in International Law* (Cambridge University Press 2014) 66.

⁹¹⁵ M. Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law' (2014) 10 *International Organization Law Review* 289.

⁹¹⁶ *ibid* 317.

(UN) peacekeepers' exploitation of children in the Central African Republic (CAR) emerged. CAR has been caught in a continuous civil war for many years. Bangui, the capital of CAR, was seized in 2013 by rebel groups in a ploy to overthrow the government. In 2014, the UN peacekeeping mission, MINUSCA, deployed about 10,050 Peacekeepers and 2,000 police officers to assist in ending the conflict between the rebel groups and the unstable government. In the course of the mission, several incidents of sexual abuse by UN peacekeepers were reported.

These are not the first and only incidents of sexual abuse by UN peacekeepers in states where they were entrusted with the protection of civilians yet in which they used their power to exploit some civilians. UN peacekeepers have been accused of sexual abuse since the early 1990s with cases reported in Bosnia and Herzegovina, Kosovo, Cambodia, East Timor, West Africa, the Democratic Republic of the Congo, Haiti, Liberia, and South Sudan. The guilty peacekeepers exploited, degraded and misused their powers to perpetrate various forms of sexual abuse, thereby transgressing the very human rights conventions they were meant to model.⁹¹⁷

The question burning on most lips is whether the UN is responsible when peacekeepers sexually abuse civilians. The UN has not been sued for the sexual abuses committed by its peacekeepers because they fall under the jurisdiction of the states that contribute troops to the UN peacekeeping missions. Under a typical Status of Forces Agreement (SOFA) signed between the UN and troop-sending states, peacekeepers retain criminal jurisdiction over the troops they contribute to the UN, and the troops remain part of their respective national armies.⁹¹⁸

⁹¹⁷ A. Browning, *Sexual Abuse at the Hands of UN Peacekeepers in Central African Republic*, April 2017, Available at <<http://hrbrief.org/2017/04/sexual-abuse-hands-un-peacekeepers-central-african-republic/>> Last accessed 4 July 2017.

⁹¹⁸ M. Ndulo, 'The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions,' (2009) 27 *Berkeley Journal of International Law* 128, 156.

DISPUTE RESOLUTION

Once a plaintiff state has attributed an internationally wrongful act to the defendant state and invoked the responsibility of the latter, the matter is ready to go through the process of international dispute resolution.⁹¹⁹ The workings of international law very much pivot on resolving international disputes, which allows states to maintain peace. Maintaining peace is regarded as the fundamental purpose and ultimate goal of international law.⁹²⁰

In particular, dispute resolution forms one of the core areas of international law. And, together with sources of international law, state responsibility, and the place of international law in Namibian law, dispute resolution is indispensable for understanding international law in the Namibian context. An important part of the argument that Namibia has made a contribution to international law larger than its demographic size finds its basis on the cases that went to the International Court of Justice (ICJ) for resolution. Threaded throughout this book and in this chapter, the *South West Africa*/Namibia cases⁹²¹ have greatly contributed to how international law developed. Like Dugard said, the four advisory opinions and the two judgments in the South West Africa cases represent a large part

⁹¹⁹ See International Dispute Resolution (June 2007) Available at <https://gnso.icann.org/en/drafts/intl-dispute-resolution-overview-june-2007.pdf>. Also see International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Rules Amended and Effective June 1, 2014, Fee Schedule Amended and Effective July 1, 2016, for a comprehensive guide on the latest different types of International Dispute Resolution Procedures. Available online at ocdr.org.

⁹²⁰ M.N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 914.

⁹²¹ See Washington University Law Review (1967) 2 The South West Africa Cases, Available at: http://openscholarship.wustl.edu/law_lawreview/vol1967/iss2/3. Also *Advisory Opinion on Namibia*, Case Briefs, I.C.J., Advisory Opinion, 1971, I.C.J. Rep 16, available at <http://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-3/advisory-opinion-on-namibia/>.

of the ICJ's jurisprudence.⁹²² I unveil further traces of how Namibia influenced the development of international law.

In this chapter, I use the ICJ cases involving Namibia and the reparations claims for the 1885-1990 Ovaherero-Nama genocide to illustrate the judicial process on the international scene. I proceed as follows. First, I go over the two ways of resolving differences on the international scene: diplomacy and adjudication. I continue by looking closely at diplomacy as a way of mediating inter-state disputes or those involving states otherwise. In the next section of the chapter, I present the principal international courts after I outline some central issues with regard to international adjudication. But, as this book emphasises the *public* aspects of international law, I dwell on the ICJ, and I put a special gaze on the *South West Africa* cases that appeared before that Court.

1. Methods of resolving international disputes

When they decide to settle their differences, states may choose to resolve an international dispute either by diplomatic or judicial means.⁹²³ Nonetheless, all the available methods for resolving disputes depend on the consent of the states concerned.⁹²⁴ States settle most disputes by diplomatic means in international affairs.⁹²⁵ The settlement of disputes through international courts remains “relatively exceptional”.⁹²⁶ And it constitutes but one of the mechanisms for maintaining international peace.

⁹²² J. Dugard, *International Law, A South African Perspective* (4th edn, Juta and Company (Pty) Ltd 2011) 451.

⁹²³ E. Jorge, *et al*, Diplomatic and Judicial Means of Dispute Settlement, in M. East (eds.) (BRILL 2012); W. Abdulrahim, Peaceful Settlement of Disputes, Available on <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/14-peaceful-settlement-of-disputes>.

⁹²⁴ Shaw *op cit* 916.

⁹²⁵ This may be because *PC.J.J.*, Series A, No. 2, p. 15 laid out that “before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by diplomatic negotiations.” in Office of Legal Affairs Codification Division, *Handbook on the Peaceful Settlement of Disputes between States*, United Nations, New York, 1992, p. 9.

⁹²⁶ I. Brownlie, *Principles of Public International Law* (8th edn, Oxford University Press 2012) 703.

Nevertheless, international law over-emphasizes adjudication at the expense of other methods of resolving disputes.⁹²⁷ Hence international courts and tribunals proliferate, and the judicialisation of international disputes prove this phenomenon.⁹²⁸ This could pose a problem because most disputes tend to be intra-state, which implies that these disputes involve both matters within a state (as opposed to matters between states) and complex matters that many may consider “extra-legal” (i.e., legal techniques cannot resolve those disputes).⁹²⁹ This preference for adjudication restricts the capacity of international law to resolve disputes.⁹³⁰

In any given dispute involving them, states have several dispute-settlement mechanisms at their disposal. The *Chad-Libya border dispute*⁹³¹ provides an excellent example. To put an end to a dispute that broke out in 1973 and that led to armed conflict between the two, Chad and Libya agreed to settle the dispute peacefully, then they called on the ICJ to adjudicate, and following the ICJ’s decision in that case the parties agreed that Libya should withdraw from the contested territory. Similarly, in pursuing its claims for the genocide of Ovaherero and Nama peoples,⁹³² the Namibian government navigated between political (i.e., diplomatic) and judicial processes.⁹³³

⁹²⁷ A. Spain, ‘Integration Matters: Rethinking the Architecture of International Dispute Resolution’ (2010) 32 *University of Pennsylvania Journal of International Law* 1.

⁹²⁸ *ibid* 4.

⁹²⁹ *ibid* 4-5.

⁹³⁰ *ibid* 4.

⁹³¹ See G. J. Naldi, ‘*The International and Comparative Law Quarterly*’ (1995) 44, 3, Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad) 683-690.

⁹³² G. Baltzois, Herero and Namaqua Genocide: The little-known first genocide of the Second Reich, Ancient Origins (2015) Available at <http://www.ancient-origins.net/history-important-events/herero-and-namaqua-genocide-little-known-first-genocide-second-reich-003828>.

⁹³³ Between 2017 and 2018, the Namibian justice ministry paid a Windhoek-based lawyer (i.e., Sackeus Akweenda) and number of lawyers based in Europe (i.e., Paul Clark, Dexter Dias, Cameron Miles, Richard Reynolds, and Anna Uukelo) for legal advice on the genocide and, around 2016, the Namibian government has engaged in direct negotiations with Germany on the same issue.

2. Diplomacy

2.1 Why states need diplomacy

Treaties providing for dispute settlement usually include diplomatic means of settling disputes.⁹³⁴ And the role of politics in mediating disputes diplomatically is pivotal.⁹³⁵ Most often, it is not possible to understand, let alone settle, certain inter-state disputes without knowing the wider international political context in which those states found themselves in.⁹³⁶

Likewise, you will not manage to wrap your head around the ongoing genocide-reparations negotiations between Namibia and Germany without paying attention to domestic politics in both countries. Politics surfaced in *Rukoro v Germany* when some members of the Ovaherero and Nama communities unsuccessfully asked a New York federal court to order that the Namibian and German governments give them seats at the negotiating table.⁹³⁷ Issues of how far those negotiations include and represent the genocide's victims and other key stakeholders not only feature debates in Namibia but

⁹³⁴ *ibid* 11. A number of treaties place on the States Parties thereto an obligation to carry out “negotiations”, “consultations”, or “exchanges of views” whenever a controversy arises in connection with the treaty concerned.

Examples of such treaties are the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68, annex, art. 15, para. 1), the 1975 Vienna Convention

on the Representation of States in their Relations with International Organizations of a Universal Character (art. 84), the 1982 United Nations Convention on the Law of the Sea (art. 283, para. 1) and the 1959 Antarctic Treaty (art. VIII, para. 2). Under some of those treaties, parties to a dispute arising from the interpretation or application of the treaty are under an obligation to start the consultation or negotiation process without delay (see art. 283, para. 1, of the United Nations Convention on the Law of the Sea; art. 15, para. 2, of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; and art. VIII, para. 2, of the Antarctic Treaty).

⁹³⁵ L. van den Herik, *et al.* ‘International Law in Action: A Guide to the International Courts and Tribunals in The Hague’ Diplomatic versus Judicial International Dispute Settlement (Universiteit Leiden, Coursera) Available at <https://www.coursera.org/learn/international-law-in-action/lecture/0NNsv/diplomatic-versus-judicial-international-dispute-settlement>.

⁹³⁶ Shaw *op cit* 916.

⁹³⁷ *Vekuii Rukoro and Others v Federal Republic of Germany* [2019] US District Court, Southern District of New York 4-5.

they will likely influence the shape and size of the negotiation outcomes as well.

Parties may prefer diplomacy to a court battle when they can barely frame their disputes in such a manner that the law may solve them satisfactorily and the courts may intervene effectively. This situation, I think, arose in *Rukoro*. As disheartening as the judgement may have been to them, the complainants would have only won a partial victory, even assuming that they had convinced the judge that her court had jurisdiction to order that Germany pay damages for the genocide.⁹³⁸ Existing courts, whether domestic or international, cannot do justice to the unspeakable ordeal the Ovaherero and Nama endured at the hands of the German colonisers because, among others, the genocide happened long before any of the international courts with power to try genocide today came into being, and courts in foreign states (including the US and Germany) will find it very hard to decide cases based on acts that took place in other states – Namibia, in *Rukoro*.⁹³⁹ And that case exemplifies this sobering reality. To be sure, the proceedings did not focus on genocide as such and, instead, treated it as a civil wrong, and not as a crime.⁹⁴⁰

The fact that states prefer mediation over adjudication underlines the significance of diplomacy.⁹⁴¹ Presumably, states like mediation better than adjudication for the same reasons that people favour alternative dispute resolution (ADR) over litigation: greater speed and flexibility, lower costs, higher probability of meeting the needs of the parties to a dispute, and possibility of win-win outcomes. Furthermore, diplomacy takes centre stage as the rules of modern international law forbid states from using force. Indeed, since its advent, the United Nations Charter no longer permits states to use force to resolve disputes.⁹⁴² In Harris's view, the prohibition on the

⁹³⁸ D. Zongwe and B. Tjatjara, 'The Bones of Contention in the Ovaherero-Nama Genocide Case' *The Namibian* (Windhoek, 15 March 2019) 10.

⁹³⁹ *ibid.*

⁹⁴⁰ The Ovaherero and Nama complainants in the *Rukoro* case brought the suit against Germany under the Alien Tort Claims Act (28 U.S.C. § 1350), a US statute dealing with torts (i.e., delicts) and not with criminal offences.

⁹⁴¹ A. Spain *op cit* 1.

⁹⁴² See N. Schrijver, 'The Use of Force under the UN Charter: Restrictions and Loopholes' (2003) The ACUNS, (John W. Holmes Memorial Lecture, United Nations).

use of force to resolve disputes probably reflects customary international law.⁹⁴³

The United Nations Charter only permits states to settle their disputes peacefully.⁹⁴⁴ Article 2(3) of the Charter provides that:

[a]ll members state shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

Similar provisions can be found in the 1982 Manilla Declaration on the Peaceful Settlement of International Disputes⁹⁴⁵ and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States.

These provisions oblige states to seek settlement of their disputes by peaceful means.⁹⁴⁶ However, nothing obliges states to resolve their disputes.⁹⁴⁷ States locked in a dispute may decide to maintain frosty relations with one another.

2.2 Negotiation, mediation, conciliation, and good offices

Diplomatic means of settling international disputes comprise negotiation, mediation, conciliation, and good offices.⁹⁴⁸ Political means of settling disputes between or involving states can fall in two categories: diplomatic means of settling disputes in general and the non-judicial means of settling disputes under the United Nations (UN).⁹⁴⁹

⁹⁴³ D. Harris, *Cases and Materials on International Law* (Sweet & Maxwell 2010) 833.

⁹⁴⁴ Articles 2(3), 2(4) and 33 of the Charter of the United Nations, 1945.

⁹⁴⁵ G.A. Res.37/10, G.A.O.R., 37th Sess., Supp. 51, 261 (1982); and (1982) 21 I.L.M. 449 (final draft).

⁹⁴⁶ Shaw op cit 916.

⁹⁴⁷ Brownlie op cit 703.

⁹⁴⁸ See United Nations, 'Handbook on the Peaceful Settlement of Disputes Between States' (Office of Legal Affairs, United Nations 1992), 7.

⁹⁴⁹ S. Dogru, 'Introduction to International Law II, Peaceful Settlement of International Disputes' (Cag University 2016) Available at http://www.cag.edu.tr/upload/2016/05/international-law-spring-judiciary_1.ppt.

Both diplomats and scholars recognize the special significance of negotiating or ‘getting to the table’.⁹⁵⁰ It is the oldest means of resolving differences.⁹⁵¹ In *Mavrommatis*, Judge Moore defined ‘negotiation’ as “the legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences”.⁹⁵² Unlike mediation, negotiations do not – in their purest forms – involve a third party.⁹⁵³

Mediation is a confidential negotiation between states to settle an international dispute where an unbiased third party (i.e., the mediator) seeks to reconcile the rival claims of the states and to put forth his own proposals.⁹⁵⁴ In making proposals, the mediator aims to find a solution acceptable to both parties. The presence of the third party sets mediation apart from good offices: The third party is active in mediation whereas he generally stays passive when he merely offers good offices.⁹⁵⁵ Also, mediation differs from arbitration and judicial methods of settling disputes in the sense that the solutions that the mediator proposes do not bind the parties.

Conciliation has a semi-judicial nature as it entails elucidating facts, hearing parties, and formulating proposals for the resolution of disputes.⁹⁵⁶ When it is resorted to, conciliation involves setting up a commission of inquiry to investigate and report on the facts surrounding the dispute. Conciliation arose from the commissions of inquiry provided for in the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, and the commissions established in the series of arbitration treaties concluded by the US between 1913 and 1914 (the Bryan treaties).⁹⁵⁷

⁹⁵⁰ M. Rogoff, ‘The Obligation to Negotiate in International Law: Rules and Realities’ (1994) 16 Michigan Journal of International Law 141.

⁹⁵¹ R.P. Barnidge, ‘The International Law of Negotiation as a Means of Dispute Settlement’ (2013) 36 Fordham International Law Journal 545, 548.

⁹⁵² *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 62-63 (30 August) (Moore J., dissenting).

⁹⁵³ R.P. Barnidge op cit 545, 549.

⁹⁵⁴ See also United Nations, ‘Handbook on the Peaceful Settlement of Disputes Between States’ (Office of Legal Affairs, United Nations 1992) 40-45.

⁹⁵⁵ ibid 33.

⁹⁵⁶ Brownlie op cit 704.

⁹⁵⁷ ibid.

Arbitration refers to a procedure more formal than diplomatic approaches and similar to judicial processes.⁹⁵⁸ It stands mid-way, so to speak, between diplomacy and adjudication. It predates conciliation. In fact, arbitration predates the more institutionalized types of international jurisdiction.⁹⁵⁹ While permanent international courts came into being fairly recently, international arbitration involving states did not.⁹⁶⁰ Public international arbitration – understood as the “settlement of differences between States by judges of their own choice, and on the basis of respect for law” – dates back to the earliest recorded times.⁹⁶¹

3. The judicial landscape in international law

The other way of resolving disputes in international law is through the judicial process, in other words, through courts or court-like fora. Unlike arbitration, which consists of ad hoc, non-permanent tribunals, international courts are permanent structures. Permanent international courts emerged recently.⁹⁶²

One major disadvantage of settling international disputes diplomatically remains that, unlike the resolution of disputes by the courts, diplomacy will do very little to neutralise the huge power imbalances, like those existing between Namibia and Germany – a state with one of the world’s most influential governments, and with

⁹⁵⁸ See ‘International Dispute Resolution’ (2007) Available at https://www.google.com.na/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwimi9_Z5P7UAhUMPVAKHbQpA08QFggmMAA&url=https%3A%2F%2Fgnso.icann.org%2Fen%2Fdrafts%2Fintl-dispute-resolution-overview-june-2007.pdf&usg=AFQjCNHbHxovwe8ocV5xMB3CgSKLmNX8uw.

⁹⁵⁹ Brownlie op cit 705.

⁹⁶⁰ N. Kaplan, *Role of the State in Protecting the System of Arbitration* (Chartered Institute of Arbitrators Centenary Conference 2015) 1. In considering the role of the state in relation to arbitration we have to remind ourselves that arbitration preceded state court litigation by millennia.

⁹⁶¹ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen Publishers 2003) 120.

⁹⁶² O. Fioretos, *et al*, ‘The Evolution of International Law and Courts’ in K. J. Alter (eds.) *Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016) 590-610. Reprinted in: *International Politics and Institutions in Time* (Oxford University Press 2016).

an economy more than 250 times larger.⁹⁶³ Put another way, Namibia is less likely to get the full amount that it seeks (reportedly, about N\$500 billion)⁹⁶⁴ through diplomatic channels than through the judicial route.⁹⁶⁵

Settling disputes judicially involves international courts, ad hoc arbitral tribunals, mixed commissions, and (temporary) specialised courts. Depending on the nature of the claims, litigants may send a matter to the ICJ, the dispute settlement system of the World Trade Organization (WTO), the UN Human Rights Committee, the International Criminal Court (ICC), or the Southern African Development Community (SADC) Tribunal, among others.

The diversity of courts and jurisdictions reflects the growing complexity of international affairs and their regulation. However, this development is not without its challenges.

3.1 Cross-cutting central issues

International adjudication grapples with a host of issues. To begin with, international courts have mushroomed.⁹⁶⁶ The proliferation of international courts and tribunals has heightened the risk of competing jurisdictions.⁹⁶⁷ Indeed, parties may bring a dispute involving the law of the sea before the ICJ or the UN Nations International Tribunal for the Law of the Sea.⁹⁶⁸

Courts' proliferation causes the related problem of *forum shopping*.⁹⁶⁹ Should a dispute between, say, Namibia and Botswana on the question of tariffs be brought before a panel appointed by the

⁹⁶³ Zongwe and Tjatjara op cit 10 (making the same argument).

⁹⁶⁴ About 35 billion US dollars.

⁹⁶⁵ Zongwe and Tjatjara op cit 10.

⁹⁶⁶ See 'International Dispute Resolution' (June 2007) Available at <https://gnso.icann.org/en/drafts/intl-dispute-resolution-overview-june-2007.pdf>. Also R. Badinter, *et al.* S. Muller and J. Resnik (Co-Chairs), *Law's Borders: Yale Global Constitutionalism*, Law's Future(S): The Sustainability of Transnational, National, And International Courts (2012).

⁹⁶⁷ R. P. Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' (Scholarly Works, Paper 9 2000) Available at http://scholarship.law.nd.edu/law_faculty_scholarship/9.

⁹⁶⁸ Article 287(1) of the Convention on the Law of the Sea, 1982.

⁹⁶⁹ See 'Forum Shopping' (Legal Information Institute, Cornell University) Available at https://www.law.cornell.edu/wex/forum_shopping. When multiple courts have concurrent jurisdiction over a plaintiff's claims, the plaintiff may *forum shop*, or choose the court that will treat his or her claims most favourably.

Secretariat of the WTO or rather before the SADC Tribunal? In both national law and international law at both public and private levels, the great diversity of national and international fora and procedures for settling disputes has created an incentive to go shopping for rules and fora.⁹⁷⁰ Parties shop around in search for the courts or tribunals (and their corresponding rules) that offer the best prospects of succeeding on their respective claims, thereby undermining legal certainty as well as the stability and predictability of international rules.

Besides the emergence and proliferation of international courts, one issue continues to bedevil the international system, namely: whether and, if so, to what extent states comply with international law. One major difference between international law and municipal law lies in compulsory jurisdiction: International courts do not have such jurisdiction.⁹⁷¹ An international court can only assert its jurisdiction over a state if that state has consented to it.⁹⁷² The jurisdiction of international courts emanates from state consent such that a crucial question for those courts is always whether the state parties to a dispute before them have consented to the jurisdiction of the court.⁹⁷³

3.2 The prominent international courts

Now on to the major courts in international law. I first present the most prominent courts from a public international law vantage point, then gradually proceed to describe the less important ones, and end with the regional courts in Africa that are relevant to Namibia.

⁹⁷⁰ E.-U. Petersmann, 'Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralisation of Dispute Settlement in International Trade' (2006) 27 *University of Pennsylvania Journal of International Economic Law* 273.

⁹⁷¹ F. Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Brill 2011) 84. "Public international law does not therefore have major similarities with municipal systems - The system of public international law does not have compulsory jurisdiction and therefore perpetrators of various crimes may escape punishment because of the lack of an appropriate international enforcement measure."

⁹⁷² S. Macedo, 'Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law' in D. F. Orentlicher (ed.) (University of Pennsylvania Press) 217.

⁹⁷³ T. Buergerthal and S.D. Murphy, *Public International Law, in a Nutshell* (5th edn, West Publishing Co 2002) 77.

Except for the Permanent Court of Arbitration (PCA), all these courts, however, predate the Ovaherero-Nama genocide from 1885 to 1909. This implies that none of these courts can assert jurisdiction in the genocide matter. Even the PCA will not have jurisdiction in the Ovaherero-Nama genocide case because, as I explain later in this section, the PCA deals with inter-state arbitration and Namibia is not one of its members. On the whole, *the biggest legal obstacle to hearing the Ovaherero-Nama genocide-reparation claims boils down to (the lack of) jurisdiction.*

a) The International Court of Justice

Pope John Paul II, while at the seat of the International Court of Justice (ICJ) in The Hague on 13 May 1985, stated that:⁹⁷⁴

Unfortunately, in today's world, even the peaceful settlement of disputes is often the province of diplomacy determined more by self-interest than by the requirements of the common good of the international community – common good based on what is right and just... The task the International Court of Justice as well as the Permanent Court of Arbitration is to bring an element of impartiality and objectivity to bear on dealings between states... In the view of the Holy See, there are a number of ways in which the judicial elements can play a wider role in the international relations: by States and International Organisations making more intensive use of the International Court of Justice; or by a wider acceptance of the so-called compulsory jurisdiction of the Court.

The ICJ is one of the oldest international courts.⁹⁷⁵ This court hears and determines cases involving various aspects of international law. When it comes to international law, the ICJ represents the prime, archetypal court.

I present this court in greater detail and sharper focus later in this chapter.

⁹⁷⁴ R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Martinus Nijhoff Publishers 1993) iix.

⁹⁷⁵ V. Chetail, 'The contribution of the International Court of Justice to international humanitarian law' (2003) 85, 850 *IRRC* 235. The court delivered its very first judgement in the *Corfu Channel Case* on 9 April 1949.

b) The dispute settlement system of the World Trade Organization

The World Trade Organization (WTO) also has a system for settling disputes. Its system, however, only concerns itself with disputes in the broad field of international trade. There exists, nonetheless, no international court with as much gravitas in trade and economic relations as the WTO.⁹⁷⁶ This authority and influence do not shield the WTO, like many other international fora, from heavy criticisms. Ogbonna laments that the WTO was not established for development but to extend abroad the market of the rich nations that founded it.⁹⁷⁷ Ugandan scholar Tandon goes as far as describing the WTO as a “conspiratorial organization”.⁹⁷⁸ He complains that decisions in the WTO are made in ‘green rooms’ by a few select members (i.e., the industrialized states of the global North and a small number of small countries from the South) yet imposed on the rest of the planet.⁹⁷⁹

The WTO dispute-settlement system consists of panels of arbitrators and an Appellate Body that hears appeals from decisions by the panels. Unlike the ICJ, it does not entertain most aspects of public international law. The WTO has a mixed jurisdiction, consisting of arbitration and adjudication, in the sense that its dispute-resolution function involves both arbitration and adjudication. Taniguchi, a former Member of the WTO Appellate Body, believes that the WTO comes the closest to arbitration.⁹⁸⁰

⁹⁷⁶ S. Shoraka, ‘World Trade Dispute Resolution and Developing Countries: Constructing a Fair Adjudication of the WTO’ (2006) 3 *Manchester Journal of International Economic Law* 2 and 28.

⁹⁷⁷ J.I. Ogbonna, ‘The WTO for Whom: Towards a Philosophy of WTO Law,’ in E.T. Laryea *et al.* (eds.) *International Economic Law: Voices of Africa* (Siber Ink 2012) 40.

⁹⁷⁸ Y. Tandon, *Trade Is War: The West’s War against the World* (OR Books 2015).

⁹⁷⁹ *ibid.*

⁹⁸⁰ Y. Taniguchi, ‘The WTO Dispute Resolution as Arbitration’, (2010) 3 *Contemporary Asia Arbitration Journal* 1.

To date, no cases involved Namibia, either as a complainant or a respondent. In fact, except for South Africa⁹⁸¹ and Egypt,⁹⁸² no African state has been involved in the WTO dispute settlement system. The African countries that have participated in the dispute-settlement process have done so only as third parties and not as complainants.⁹⁸³

Does this reflect a typically African approach to dispute resolution? However, other factors, located in the political economy of states in Africa, may explain why those states hesitate or refuse to initiate legal action before the WTO. Whatever the case may be, some scholars believe that African states do not make the most of the WTO dispute-resolution system by not bringing claims before the WTO. African states lose out because participating in that system would enable them to curtail trade barriers, further integrate global trade, and influence and reshape that very system.⁹⁸⁴

⁹⁸¹ E. Kessie and K. Addo, 'African Countries and the WTO Negotiations on the Dispute Settlement Understanding' 2. Available at <http://www.ictsd.org/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf>. The two African countries which are relatively active are Egypt and South Africa, which happen to have Africa's biggest economies. Two cases have been initiated against South Africa, namely *South Africa – Anti-Dumping Duties on the Import of Certain Pharmaceutical Products from India*, WT/DS168 and *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey*, WT/DS288.

⁹⁸² *ibid.* Four cases have been initiated against Egypt, namely *Egypt – Import Prohibition on Canned Tuna with Soyabean Oil*, WT/DS205; *Egypt – Definitive Anti-Dumping Duties on Steel Rebar from Turkey*, WT/DS211, *Egypt – Measures Affecting Imports of Textile and Apparel Products*, WT/DS305 and *Egypt – Anti-dumping Duties on Matches from Pakistan*, WT/DS327. *Egypt participated as a third party in EC – Bed Linen*, WT/DS 141 and *EC – Provisional Steel Safeguards*, WT/DS260.

⁹⁸³ *ibid.* In *EC – Bananas*, WT/DS27, Cameroon, Cote d'Ivoire, Ghana and Senegal participated as third parties with a view to safeguarding their preferences under the EC's banana regime. In *EC – Export Subsidies on Sugar*,

WT/DS265/266/283, Cote d'Ivoire, Kenya, Madagascar, Malawi, Mauritius, Swaziland and Tanzania participated as third parties to defend their preferences under the Sugar protocol. In *US – Subsidies on Upland Cotton*, WT/DS267, Benin and Chad participated as third parties given the importance of cotton to their economies. In *EC – Asbestos*, WT/DS135, Zimbabwe participated as a third party because of its broader export interest in asbestos. In *US – Shrimp*, WT/DS58, Nigeria and Senegal participated as third parties because of their export interest in shrimps.

⁹⁸⁴ M. Limenta, 'The WTO Dispute Settlement System' in L. Boulle, E.T. Laryea and L. Sucker (eds) *International Economic Law and African Development* (Siber Ink 2014) 210-211.

c) The International Criminal Court

The International Criminal Court (ICC) sits in The Hague, the Netherlands. The ICC exercises jurisdiction in cases where the ICC Prosecutor accuses certain people of having committed the most evil international crimes, namely war crimes, crimes against humanity, genocide and aggression. Created in 1998, the Rome Statute establishing the ICC entered into force in 2002. Africa is the region with the largest number of states parties to the Rome Statute.⁹⁸⁵

The Preamble to the Rome Statute notes that, in the 20th century, millions of men, women and children have been victims of “unimaginable atrocities that deeply shook the conscience of humanity” and that those crimes “threaten the peace, security and well-being of the world”. The ICC wishes, through international cooperation, to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.⁹⁸⁶ Aside from punishing the guilty, the Rome Statute also empowers victims to participate in criminal proceedings⁹⁸⁷ and provides effective remedies for victims of international crimes.⁹⁸⁸ Those remedies include reparations, which can take the form of restitution, compensation and rehabilitation.⁹⁸⁹

The ICC has made headlines lately as the African Union (AU) and AU member states clashed with the ICC.⁹⁹⁰ The AU and some of its members accuse the ICC of neo-imperialism and neo-colonialism by solely targeting African leaders.⁹⁹¹ In 2015,

⁹⁸⁵ As of 2017, 124 countries were States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

⁹⁸⁶ Preamble of the Rome Statute, 1998.

⁹⁸⁷ Article 68 of the Rome Statute, 1998.

⁹⁸⁸ Article 75 of the Rome Statute, 1998.

⁹⁸⁹ Article 75(1) of the Rome Statute, 1998.

⁹⁹⁰ Associated Press in Addis Ababa, *African Leaders Plan Mass Withdrawal from International Criminal Court*, The Guardian, 31 January 2017. Available at <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>.

⁹⁹¹ See C. Tarfusser, ‘The International Criminal Court vis-à-vis Africa: A Defence from Inside the Court’ (28 March, 2017) Italian Institute for International Political Studies. Available at <http://www.ispionline.it/en/pubblicazione/international-criminal-court-vis-vis-africa-defence-inside-court-16510>.

representatives of the ruling African National Congress (ANC) in South Africa reportedly accused the ICC of nurturing an anti-African bias and of being “no longer useful for the purposes for which it was intended”.⁹⁹² Ugandan President Yoweri Museveni, at the swearing-in ceremony for his re-election as President in 2016, described the ICC as a “useless body” run by a “bunch of useless people”.⁹⁹³

The ICC should not dismiss those accusations and the tremendous political pressure that accompany them. Perhaps, it would be wiser to heed Dugard’s general advice: Other international courts face the same challenge as the ICC in that, for them to survive as courts, they must “temper courage with caution”; but, to maintain their credibility, they must occasionally take bold action, even if that means deciding against the most powerful states.⁹⁹⁴

While concerns for the impartiality of courts are legitimate, selectivity has unfortunately always formed a part of international criminal justice.⁹⁹⁵ An effective way of addressing concerns about the impartiality of an international court is not to pull out from that court, but to engage it.⁹⁹⁶ In the particular case of Namibia, I cannot help but wonder whether the country had to make the news for its intention to denounce the Rome Statute establishing the ICC.⁹⁹⁷

⁹⁹² A. Taylor, ‘Why so Many African Leaders Hate the International Criminal Court’ *The Washington Post* (15 June 2015) Available at <<https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/>> Last accessed 18 October 2018.

⁹⁹³ C. Morello, ‘International Arrest Warrant Doesn’t Deter Globe-Trotting by Sudan’s President’ *The Washington Post* (13 May 2016) Available at <https://www.washingtonpost.com/world/national-security/international-arrest-warrant-doesnt-deter-globe-trotting-by-sudans-president/2016/05/13/ee1559a8-1912-11e6-9e16-2e5a123aac62_story.html> Last accessed 18 October 2018.

⁹⁹⁴ J. Dugard op cit 468.

⁹⁹⁵ D. Guilfoyle, *International Criminal Law* (Oxford University Press 2016) 88. Two classic criticisms of international criminal law: that its legitimacy is undermined by its selectivity; and, in a variant on the same argument, that it represents only ‘victor’s justice’.

⁹⁹⁶ See N. Bohler-Muller and D. Zongwe, ‘It Is Self-Defeating for Africa (and South Africa) to Withdraw From the International Criminal Court’ (2017) 9 *Namibia Law Journal* 115.

⁹⁹⁷ ‘Nam Supports Collective Withdrawal from ICC’ *the Namibian* (9 February 2017) 3; and ‘Ndaitwah Clarifies Namibia’s Withdrawal from ICC’ *New Era* (11 March 2016) <<https://neweralive.na/posts/ndaitwah-clarifies-namibias-withdrawal-icc>> accessed 22 March 2019.

While Namibia's stance may have won it several friends among African leaders, I very much doubt whether it was worth risking Namibia's pristine reputation and strategic goals for a court unlikely to meddle in Namibian affairs in the near and the foreseeable future.

The ICC used to operate alongside two *ad hoc* international criminal tribunals set up by the UN, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁹⁹⁸ and the International Criminal Tribunal for Rwanda (ICTR). Also, the ICC occasionally draws on the jurisprudence emanating from both the ICTY (1993-2017) and the ICTR (1994-2015). However, the mandates of the ICTY and the ICTR ended on 31 December 2017 and 31 December 2015, respectively.

d) The International Tribunal for the Law of the Sea

The UN created this tribunal after developing nations lost faith in the ICJ because of its decisions in the *South West Africa Cases*⁹⁹⁹ in 1966.¹⁰⁰⁰ In the years following the *South West Africa Cases*, the ICJ's reputation plummeted in the eyes of policy makers in developing states, who saw the court as wedded to Western interests.¹⁰⁰¹

Like its name indicates, this international tribunal adjudicates on disputes involving the law of the sea. The United Nations Convention on the Law of the Sea of 1982 (LOSC) created this tribunal. Twenty-one judges sit on the Tribunal.

The LOSC has established a permissive jurisdiction in the sense that states may choose between the Tribunal, the ICJ, an arbitral tribunal, or a "special" arbitral tribunal.¹⁰⁰² The International Tribunal for the Law of the Sea does, however, enjoy exclusive jurisdiction with regard to the special procedure for releasing vessels detained because they violated the provisions of the LOSC.¹⁰⁰³ Litigants have invoked this exclusive jurisdiction on many occasions, and that

⁹⁹⁸ D. W. Neubauer and S. S. Meinhold, *Judicial Process: Law, Courts, and Politics in the United States* (Cengage Learning 2016) 408.

⁹⁹⁹ *South West Africa Cases* [1966] I.C.J. Reports 6.

¹⁰⁰⁰ D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell) 836.

¹⁰⁰¹ *ibid.*

¹⁰⁰² Article 287(1) of the Convention on the Law of the Sea, 1982.

¹⁰⁰³ T. Buergenthal and S.D. Murphy *op cit* 95.

exclusive jurisdiction constitutes the bulk of the Tribunal's judicial activities.¹⁰⁰⁴

e) The International Centre for the Settlement of Investment Disputes

The International Centre for the Settlement of Investment Disputes (ICSID) settles disputes between foreign investors and the states that host their investments (host states). Headquartered in Washington DC, in the United States (US), ICSID is the creature of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), adopted in 1965.

International investment law built norms and institutions such as bilateral investment treaties (BITs) and ICSID in the middle of the 19th century. In 1964, when the World Bank invited the newly independent African nations to join ICSID, most of them did, although Latin American states refused to do so.¹⁰⁰⁵ African states surmised that joining ICSID would draw greater FDIs. Instead, many African states appeared before ICSID in 97 cases brought against them by foreign investors.¹⁰⁰⁶ Another notable feature of the ICSID: African states accepted how powerful, capital-exporting nations interpreted the investment treaties that nations on the continent entered into.¹⁰⁰⁷

The matters before the ICSID are arbitrations pitting foreign investors against host states. Recently, ICSID arbitration tribunals have come under increasing criticism because of the effect of

¹⁰⁰⁴ *ibid.*

¹⁰⁰⁵ W. Kidane, 'The China-Africa Factor in the ICSID Legitimacy Debate' (2014) 35 *University of Pennsylvania Journal of International Law* 559, 561-562.

¹⁰⁰⁶ United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Available at <<http://investmentpolicyhub.unctad.org/>> Last accessed 23 August 2018.

¹⁰⁰⁷ W. Kidane *op cit* 572.

injunctive reliefs¹⁰⁰⁸ on host state's power to legislate and regulate.¹⁰⁰⁹ For instance, in 2007, a group of foreign investors in the granite mining sector took South Africa to ICSID because they argued that the South African government's black economic empowerment (BEE) business policies violated its obligations under the relevant BITs.¹⁰¹⁰ This episode shows that international investment law, and ICSID in particular, work to insulate foreign capital from domestic political and democratic pressures protected in the constitution, such as the demands for the greater representation of Blacks in business.¹⁰¹¹

3.3 The Permanent Court of Arbitration

Established by the 1899 Hague Convention for the Pacific Settlement of International Disputes, as modified in 1907,¹⁰¹² the Permanent Court of Arbitration (PCA) is one of the oldest international dispute resolution fora. It is older than the ICJ. Between 1900 and 1920, the PCA served as the principal organization for arbitration.¹⁰¹³

As a matter of fact, the PCA is not a court or a tribunal. It represents the first permanent panel of international arbitrators.¹⁰¹⁴ The PCA actually constitutes a system for managing arbitration by

¹⁰⁰⁸ An injunctive relief (or simply an 'injunction') refers to an act or a prohibition ordered by a court, requested by one party to a dispute, and granted or denied by the court. Parties request such orders in petitions to the court for an injunction. Injunctive reliefs call for the court to use its authority to handle an issue and does not constitute a judgment for money.

Typically, both sides of a dispute argue whether the court should grant the relief argued by both sides in a hearing rather than in a full-scale trial, although parties may sometimes include it in a lawsuit for damages and/or specific contract performance. Historically, the power to grant injunctive relief originate in English equity (i.e., English equity courts) rather than damages from law courts.

¹⁰⁰⁹ See T. Cheng, 'American University International Law Review' (2005) 20, 3 Power, Authority and International Investment Law 465 – 520.

¹⁰¹⁰ See, for example, *Piero Foresti, Laura de Carli and Others v Republic of South Africa*, ICSID Case No ARB(AF)/07/01.

¹⁰¹¹ D.P. Zongwe, 'Playing Hard to Get in a Sea of Many Fish: The Practical Implications of Saddling Foreign Investors With Host-Country Development' in D.P. Zongwe and Y. Dausab (eds.) *The Law Reform and Development Commission of Namibia at 25* (LRDC, Ministry of Justice 2017) 314.

¹⁰¹² Janis op cit 123-124.

¹⁰¹³ Brownlie op cit 705.

¹⁰¹⁴ Janis op cit 124.

housing the machinery for setting up tribunals and by providing a list of arbitrators.¹⁰¹⁵ States can choose arbitrators to sit on tribunals set up for the specific purposes of hearing a particular dispute between states and making a legally binding award.¹⁰¹⁶

Despite initial expectations that public international arbitration would become an alternative to war, the PCA did not live up to these high hopes.¹⁰¹⁷ However, though pure inter-state disputes settled through the PCA have dramatically declined,¹⁰¹⁸ it remains in use today. It has more than 100 members.

Namibia is not a member of the PCA and cannot therefore bring matters before the PCA.

3.4 Regional courts with jurisdiction over Namibia

a) The African Court of Justice and Human Rights

The African Court of Justice and Human Rights (African Court) is the merger of the African Court of Justice and African Court of Human and Peoples' Rights.¹⁰¹⁹ Based in Arusha, Tanzania, the African Court is the continent's main regional court. It asserts a wide jurisdiction in matters provided for in the legal instruments of the African Union (AU).

African states recently amended the Court's constitutive document in Malabo, Equatorial Guinea, to forbid the African Court from commencing or continuing cases involving criminal allegations against sitting Presidents and senior government officials (i.e., the Malabo Protocol). The Malabo Protocol is a setback for human rights and accountability, especially in view of those states' scathing criticisms of the ICC and their affirmation that the continent can itself handle the prosecution of mass atrocities.¹⁰²⁰

¹⁰¹⁵ See Permanent Court of Arbitration at <https://pca-cpa.org/en/home/>.

¹⁰¹⁶ Janis op cit 124.

¹⁰¹⁷ ibid 125.

¹⁰¹⁸ ibid 127.

¹⁰¹⁹ See 'Coalition for an Effective African Court on Human and Peoples' Rights' The African Court of Justice and Human Rights. Available at http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=6:afr-court-integrate&catid=7:african-union&Itemid=12.

¹⁰²⁰ See *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, Snapshots* (Amnesty International 2017).

I look into the Court in greater depth in Chapter 16 (on human rights).

b) The Tribunal of the Southern African Development Community

The Southern African Development Community (SADC) is the regional economic community of Southern Africa.¹⁰²¹ The Community is composed of 16 countries (member states), namely Namibia, Angola, Botswana, Comoros, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

SADC established in 1992 a tribunal. The SADC Tribunal initially had jurisdiction to hear human rights complaints brought by citizens of SADC against SADC states. However, since the decision of the Tribunal in *Campbell v Zimbabwe*,¹⁰²² the Tribunal has been reformed and no longer accepts complaints from individuals. The reformed court only entertains interstate trade disputes.¹⁰²³ It is, nonetheless, possible – in theory, at least – for private individuals to bring any SADC dispute before domestic courts in Namibia by virtue of Article 144 of the Namibian Constitution.

Like the dispute-settlement regime of the WTO, the resolution of trade dispute starts with panels of trade experts.¹⁰²⁴ Parties may appeal against the decisions of panels to the SADC Tribunal. The

¹⁰²¹ For general information about the SADC, its law and its Tribunal, see D.P. Zongwe, 'An Introduction to the Law of the Southern African Development Community' *GlobalLex* (2015) Available at <http://www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html#ThePanelProcedure>. For information on the SADC Tribunal, see O.C. Ruppel and FX Bangamwabo 'The SADC Tribunal: A Legal Analysis of Its Mandate and Role in Regional Integration' (2007) 8 *Monitoring Regional Integration in Southern Africa Yearbook* 187.

¹⁰²² (2/2007) [2008] SADCT 2 (28 November 2008).

¹⁰²³ G. Erasmus, *The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law* (tralac) Available at <https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html>.

¹⁰²⁴ Article 32(4) of the Protocol on Trade in the Southern African Development Community (SADC) Region, 1996.

problem is that, since the Tribunal was initially set up, no trade dispute has ever been referred to the Tribunal.

c) The Tribunal of the Southern African Customs Union

The Southern African Customs Union (SACU) is the world's oldest functioning customs union.¹⁰²⁵ Although the 2002 SACU Agreement provides for a tribunal,¹⁰²⁶ this court has not yet been effectively set up. This delay has not prevented private parties to commence legal action on the basis of the SACU Agreement before domestic courts in Namibia. In *Clover*, two importers of dairy products, Matador Enterprises and Clover Dairy Namibia, sued in 2014 the Minister of Trade on the argument that the extension of the infant-industry protection violated the SACU Agreement.¹⁰²⁷

4. The International Court of Justice

4.1 The birth of the Court

Before the advent of the International Court of International Justice (PCIJ) in 1920, international disputes were resolved by arbitration only.¹⁰²⁸ The PCIJ was the first international court.¹⁰²⁹

The Covenant of the League of Nations envisaged the establishment of an international court. It provided that a subsequent multilateral treaty would deal with the establishment of such international court. Even though the League of Nations failed, which also sealed the fate of the PCIJ, there was still considerable interest in the establishment of a multilateral international court.¹⁰³⁰

¹⁰²⁵ *The oldest customs union in the world hails from Africa*, African Development Bank Group, 2013. Available at <https://www.afdb.org/en/news-and-events/the-oldest-customs-union-in-the-world-hails-from-africa-12515/>.

¹⁰²⁶ Article 7 of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁰²⁷ *Matador Enterprises (Pty) Ltd (A 352/2013) and Clover Dairy Namibia (Pty) Ltd (A386/2013) v The Minister of Trade and Industry* [2014] NACHMD 156.

¹⁰²⁸ O. Fioretos op cit 590-610.

¹⁰²⁹ S. Dogru, *Introduction to International Law II, Peaceful Settlement of International Disputes* (Cag University 2016) Available at http://www.cag.edu.tr/upload/2016/05/international-law-spring-judiciary_1.ppt.

¹⁰³⁰ Janis op cit 130.

The PCIJ was, however, not an institution of the League of Nations.¹⁰³¹ After the dissolution of the League of Nations, the UN decided to integrate the international court.¹⁰³² The UN integrated the Statute of the Permanent Court of International Justice into the UN Charter and called the new institution 'International Court of Justice' (ICJ).¹⁰³³ The UN Charter made the ICJ the principal judicial organ of the United Nations.¹⁰³⁴ Thus, the ICJ is technically not a new court, but a continuation of the PCIJ.

4.2 The Court

The International Court of Justice (ICJ) was created in 1946, one year after the end of World War II. Housed in the Peace Palace in The Hague, the Netherlands, the ICJ is the principal judicial organ of the UN. Notably, the ICJ is the world's only international court of general jurisdiction.¹⁰³⁵

The ICJ is composed of 15 judges, representing various geographical regions of the globe. Judges are elected by the UN's General Assembly and Security Council. They serve for a term of nine years.¹⁰³⁶

Unlike some recent international courts and fora, the ICJ does not hear or determine cases that do not involve states.¹⁰³⁷ This restricted personal jurisdiction explains why, before achieving statehood and Independence in 1990, Namibia could not commence legal action before the ICJ in its own name. The only way for

¹⁰³¹ See *Permanent Court of International Justice (PCIJ), Overview*. Available at <http://www.indiana.edu/~league/pcijoverview.htm>.

¹⁰³² M. S. A. Mohamed, *The Role of The International Court of Justice as The Principal Judicial Organ of The United Nations*, (Thesis submitted to the London School of Economics and Political Science, University of London, for the degree of Doctor of Philosophy 1997).

¹⁰³³ A. A. C. Trindade, 'Statute of the International Court of Justice' United Nations Audiovisual Library on International Law. Available at http://legal.un.org/avl/pdf/ha/sicj/sicj_e.pdf.

¹⁰³⁴ Article 1 of the Statute of the International Court of Justice, 1945, 1 UNTS 993 [hereinafter 'ICJ Statute'].

¹⁰³⁵ T. Buergenthal and S.D. Murphy op cit 94.

¹⁰³⁶ See 'International Court of Justice is 'Court Of United Nations' in Rapidly Expanding Field of International Law, General Assembly Told By Court's President' *United Nations Press Release* (26 October 2006) Available at <https://www.un.org/press/en/2006/ga10523.doc.htm>.

¹⁰³⁷ See Article 34(1) of the ICJ Statute, 1945.

Namibia to indirectly have the ICJ pronounce itself on its case was through non-binding advisory opinions, which can be triggered by a resolution of the General Assembly, the Security Council or any specialised agency of the UN. As a result, when pursuing its independence from South Africa, the Namibian liberation movement secured only four non-binding advisory opinions; the two attempts to have a binding decision on the dispute between Namibia and South Africa failed because Liberia and Ethiopia (who initiated the court proceedings on Namibia's behalf, more of which below) were not directly affected by South Africa's ill-treatment of Namibians.

The Court hears more and more cases, in any event more than it ever did in the past or its early years. One reason for this improvement in the case load of the ICJ is the increased confidence that states have in the Court.¹⁰³⁸ This was not always the case. After the ICJ's decision in the *South West Africa Cases*, developing states started to distrust the ICJ, which it viewed as wedded to Western interests and understanding of international law. It is the *Nicaragua* case that restored the ICJ's reputation and credibility.¹⁰³⁹ Nonetheless, with an average of about three or four cases annually, the record of the ICJ is "moderate".¹⁰⁴⁰ More specifically, from 1947 to 2018, the ICJ received 175 cases.¹⁰⁴¹ And, from 1947 to 2002, the ICJ issued some 75 judgments, 120 substantive orders, and 24 advisory opinions.¹⁰⁴² Despite its mixed record, the ICJ has not disappeared, as expected by pessimists, neither did it gain in promise, as hoped by optimists.¹⁰⁴³

4.3 Consent to jurisdiction

Article 36 of the ICJ Statute provides for the different ways for states to express their consent to the jurisdiction of the ICJ. However, bear in mind that, as the ICJ ruled in *Corfu Channel*, there

¹⁰³⁸ D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell) 836.

¹⁰³⁹ *ibid.*

¹⁰⁴⁰ Janis op cit 132-133.

¹⁰⁴¹ See 'Cases' International Court of Justice. Available at <<https://www.icj-cij.org/en/cases>> Last accessed 18 October 2018.

¹⁰⁴² Janis op cit 133.

¹⁰⁴³ *ibid.*

is no duty on the parties to express their consent to the ICJ's jurisdiction in any particular form.¹⁰⁴⁴

Article 36 of the ICJ Statute reads as follows:

1. The jurisdiction of the Court comprises all cases which the parties refer to it [i.e., special agreement] and all matters specially provided for in the Charter of the United Nations [i.e., matters specially provided for in the UN Charter] or in treaties and conventions in force [i.e., compromissory clause].

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.
- [i.e., optional clause]

...

Thus, the ICJ exercises jurisdiction over four types of cases:

- (1) cases that the parties refer to the Court (special agreement),
- (2) cases provided for in treaties (compromissory clause),
- (3) cases specially provided for in the UN Charter, and
- (4) cases involving states who have made a formal declaration recognizing the compulsory jurisdiction of the ICJ (optional clause).

The *Kasikili/Sedudu Islands* dispute offers an excellent example of a case over which the ICJ has jurisdiction by virtue of a special agreement between the parties.¹⁰⁴⁵ The ICJ can also assert jurisdiction

¹⁰⁴⁴ *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948, 27.

¹⁰⁴⁵ See *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1996. Also see M. N. Shaw and M. D. Evans, 'The International and Comparative Law Quarterly' (2000) 49,4 *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* (Cambridge University Press on behalf of the British Institute of International and Comparative Law) 964-978. Available at <http://www.jstor.org/stable/761773>.

in situations where the plaintiff state accepts the ICJ's jurisdiction and the respondent state behaves in such a manner as to lead to the inference that it consents to the ICJ's jurisdiction.¹⁰⁴⁶ In these situations, the ICJ will exercise jurisdiction by virtue of the doctrine of *forum prorogatum*. In the *Genocide* case, Lauterpacht defined the doctrine as follows:¹⁰⁴⁷

[*Forum prorogatum*] is the possibility that if State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court.

Article 38(5) of the ICJ embodies this doctrine:

When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

Of all the forms of consent to the ICJ's jurisdiction, *forum prorogatum* is the most flexible. The ICJ heard for the first time a case brought on the basis of the doctrine in *Djibouti v. France*.¹⁰⁴⁸ In terms of Article 40(1) of the ICJ Statute, Djibouti initiated proceedings against France by lodging a unilateral application. France, on the other hand, in a letter to the ICJ, agreed to the ICJ's jurisdiction in the case by virtue of Article 38(5).

¹⁰⁴⁶ S. A. Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-Political Aspects* (Routledge 2014) 83 – 84. Consent, therefore, can be inferred from the acts of the parties to the matter; for instance, if one state submits a matter to the ICJ and the opposing party takes certain steps or acts in a fashion that may be regarded as submission to the Court's jurisdiction, the Court is likely to infer that as consent.

¹⁰⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 13 September 1993 (Further Requests for the Indication of Provisional Measures), Separate opinion of Judge ad hoc Lauterpacht, paragraph 24, 416,

¹⁰⁴⁸ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgement, 4 June 2008, paragraph 63, 25.

It is not unusual for a multilateral treaty to contain a clause that refers disputes to the ICJ.¹⁰⁴⁹ These clauses are known as compromissory clauses. The ICJ had jurisdiction in the *South West Africa Cases* by virtue of a compromissory clause contained in Article 7(2) of the Mandate for South West Africa. South Africa denied the continued validity of Article 7(2) of the Mandate. The ICJ rejected South Africa's denegation.

Article 36(1) of the Statute implies that the UN Charter provides for compulsory jurisdiction of the ICJ in some cases. According to Dugard, the only provision of the Charter that comes close to that implication is Article 36(3).¹⁰⁵⁰ Article 36(3) states that the UN Security Council can *recommend* to states that disputes be referred to the ICJ. Lastly, the optional clause is an important way for the ICJ to exercise its jurisdiction, although it is highly contested.

States have attached reservations to their declaration recognizing the compulsory jurisdiction of the ICJ. Reservations to formal declarations accepting the compulsory jurisdiction of the ICJ may violate international law. An example is the *Canada-Spain* dispute¹⁰⁵¹ where Canada sought to limit the ICJ's compulsory jurisdiction to matters that are compatible with international law. The ICJ held that Canada should not confuse the legality of an act and consent to the Court's jurisdiction.

4.4 Preliminary objections to jurisdiction

Parties may raise two sorts of objections. They may object to the jurisdiction of the Court to hear the case and/or to the admissibility of the opposite party's claim(s).¹⁰⁵² These two sorts of objections are

¹⁰⁴⁹ See United Nations. Treaty Section, *Final Clauses of Multilateral Treaties: Handbook* (United Nations Publications 2003).

¹⁰⁵⁰ J. Dugard op cit 458.

¹⁰⁵¹ See P. Shavloske, 'The Canadian-Spanish Fishing Dispute, a Template for Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and a Clarion Call for Ratification of the New Fish Stock Treaty' (1996) 7, 1st ed. Indiana International & Comparative Law Review 223 - 244.

¹⁰⁵² A. L. Paulus, 'Jurisprudence of the International Court of Justice: Lockerbie Cases, Preliminary Objections, Institut für Internationales Recht — Völkerrecht, Ludwig-Maximilians-Universität München' (1998) 9, 550 European Journal of International Law. Available at www.ejil.org.

formally raised as ‘preliminary objections’.¹⁰⁵³ It is not always easy to determine whether an objection relates to the jurisdiction of the Court or the admissibility of claims.¹⁰⁵⁴ For instance, in the *South West Africa* case, the ICJ did not expressly establish whether South Africa’s objections related to the Court’s competence or the admissibility of Ethiopia and Liberia’s claims.

These objections are raised before the Court moves, if at all, to consider the merits of the case.¹⁰⁵⁵ Examples of jurisdiction-related objections are that the ICJ does not have jurisdiction because the respondent state has never made a declaration recognizing the compulsory jurisdiction of the ICJ. In the *South West Africa* cases, South Africa objected to the ICJ’s jurisdiction to hear and determine the case on the basis of Article 7(2) of the Mandate for South Africa.

Examples of admissibility objections include arguments that the injured person represented by the plaintiff state has not exhausted all local remedies. South Africa also objected to the admissibility of the claims by Ethiopia and Liberia on the basis that they were not directly affected by the treatment of the Namibian people by South Africa, that is, they did not have a legal interest in the matter. The ICJ accepted South Africa’s objection.

It is difficult to blame the ICJ, in hindsight, as at the time of its decision the law did not allow the ICJ to accept the admissibility of Ethiopia and Liberia’s claims. The good news is that the Ethiopia and Liberia’s claims led to the modification of the legal position through the development of *erga omnes* obligations to which the *South West Africa* cases contributed and which is now codified in the Draft Articles on State Responsibility.¹⁰⁵⁶

¹⁰⁵³ A. Zimmermann *et al.*, ‘The Statute of the International Court of Justice: A Commentary’ in S. Talmon, eds. Article 43 (Oxford University Press 2012).

¹⁰⁵⁴ S. Rosenne and Y. Ronen, *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff Publishers 2005) 516.

¹⁰⁵⁵ Zimmermann *op cit.*

¹⁰⁵⁶ J. A. Frowein and R. Wolfrum, ‘Max Planck Yearbook of United Nations’ in K. Zemanek (eds.) *New Trends in the Enforcement of erga omnes Obligations* (Kluwer Law International 2000) 1 – 52.

4.5 Jurisdiction

The ICJ asserts two types of jurisdictions, namely advisory and contentious.¹⁰⁵⁷ The difference between the two is that advisory opinions are non-binding recommendations that clarify but do not dispose of disputes or legal questions. On the other hand, decisions in contentious proceedings are binding and dispositive of disputes and legal questions.

a) Advisory opinions

The UN Charter and the ICJ Statute empower the ICJ to render advisory opinions. The four advisory opinions it handed down in the *South West Africa/Namibia* cases are especially pertinent.¹⁰⁵⁸

The ICJ is empowered to give advisory opinions when the General Assembly, the Security Council or any specialized agencies of the UN make such requests.¹⁰⁵⁹ An example of advisory opinions requested by the General Assembly is the 1950 opinion in the *International Status of South West Africa*. Regarding advisory opinions requested by the Security Council, the 1971 *Namibia Opinion* is a good example.

The ICJ will not render any advisory opinions in a given instance where such opinions would amount to determining the rights between the parties to the case. In the 1971 *Namibia Opinion*, the ICJ was asked by the Security Council to give its opinion on the consequences of the continued occupation of Namibia by South Africa. In accepting to share its opinion on the question asked by the Security Council, the ICJ first made sure that such opinion would not amount to a determination of the dispute between Namibia and South Africa.

Advisory opinions are not binding in terms of Article 94 of the UN Charter. Whether the requesting institution will accept as obligatory the ICJ's advisory opinion is a matter that is guided by the

¹⁰⁵⁷ See International Court of Justice 'How the Court Works'. Available at <http://www.icj-cij.org/en/how-the-court-works>.

¹⁰⁵⁸ R. J. Araujo, S.J. 'Implementation of the ICJ Advisory Opinion—Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?' (2005) 22,349 *Boston University International Law Journal*, 349 – 398.

¹⁰⁵⁹ Article 96(a) of the Charter of the United Nations, 1945; and Article 65(1) of the ICJ Statute, 1945.

institution's internal law.¹⁰⁶⁰ In the UN, it is the general practice for the requesting organ to vote on whether to accept an ICJ's advisory opinion.¹⁰⁶¹

All the same, advisory opinions have legal consequences. They guide the General Assembly and the Security Council in their deliberations and decisions.¹⁰⁶² The *South West Africa* cases demonstrate how advisory opinions guide the actions of the General Assembly and the Security Council. In 1950, in the *International Status of South West Africa*,¹⁰⁶³ the ICJ ruled that South Africa's mandate over South West Africa/Namibia continued after the dissolution of the League of Nations and that South Africa was therefore obliged to account to the UN for its administration of South West Africa/Namibia. This 1950 decision was further strengthened by two subsequent decisions advising the General Assembly in its supervisory role.

Further instances where advisory opinions by the ICJ were illuminating for the UN General Assembly took place in 1955. That year, the ICJ issued an advisory opinion in which it clarified that the General Assembly was not bound by unanimity voting by the League of Nations when the latter made resolutions regarding South West Africa/Namibia. In 1956, the ICJ ruled that the South West Africa Committee of the General Assembly may, unlike the supervisory body of the League of Nations, allow petitioners to make oral submissions to the General Assembly.

By contrast, the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹⁰⁶⁴ gives an indication of the limits of advisory opinions in influencing politics at the General Assembly and

¹⁰⁶⁰ T. Buergenthal & S.D. Murphy op cit 93.

¹⁰⁶¹ *ibid.*

¹⁰⁶² See Security Council Report 'In Hindsight: The Security Council and the International Court of Justice' 2017. Available at http://www.securitycouncilreport.org/monthly-forecast/2017-01/in_hindsight_the_security_council_and_the_international_court_of_justice.php.

¹⁰⁶³ *International Status of South-West Africa*, Advisory Opinion of 11 July 1950.

¹⁰⁶⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, AKA Israeli Wall Advisory Opinion, of 9 July 2004.

the Security Council. The Security Council did not follow the advisory opinion of the ICJ, notably because the US opposed to it.¹⁰⁶⁵

b) Contentious proceedings

Unlike advisory opinions, rulings in contentious proceedings are binding on the parties to a dispute before the ICJ.¹⁰⁶⁶ The contentious jurisdiction of the ICJ applies only to disputes between states that have accepted that jurisdiction.¹⁰⁶⁷ In *DRC v Rwanda*,¹⁰⁶⁸ the ICJ held that jurisdiction always rests on state consent.

Parties (states) are allowed to bring disputes before the ICJ in terms of Article 34 of the Statute. However, international organizations, corporations and individuals are not allowed to bring matters to the ICJ.¹⁰⁶⁹ This state of affairs is a relic of history. When the Statute was drafted in 1920, states were regarded as the sole and primary subjects of international law.

The ICJ can only hear disputes that involve states that are parties to its Statute. It has refused to exercise jurisdiction where its decisions will directly impact the rights of a third party.¹⁰⁷⁰ In *East Timor*,¹⁰⁷¹ the ICJ declined to assert its jurisdiction in a case between Portugal and Australia over Indonesia's entry and continued presence in East Timor. The court reasoned that rendering a judgment in that dispute between Portugal and Australia would amount to a determination of

¹⁰⁶⁵ See, for example, B. White, 'Israel's Wall Still Deepening the Divide,' *The Guardian*, 9 July 2009, Available at <<https://www.theguardian.com/commentisfree/2009/jul/09/israel-separation-wall-palestine>>.

¹⁰⁶⁶ Article 59 of the ICJ Statute, 1945.

¹⁰⁶⁷ T. Buergenthal and S.D. Murphy op cit 79.

¹⁰⁶⁸ The Hague Justice Portal, *ICJ has no jurisdiction in DRC v. Rwanda case (New Application)*, 2006. Available at <http://www.haguejusticeportal.net/index.php?id=2661>. On 3 February 2006, the ICJ found that it has no jurisdiction in the Armed Activities case (DRC v. Rwanda).

¹⁰⁶⁹ R. Gunaratne, *Public International Law*, Who is a Subject of International Law?, 2008. Available at <https://ruwanthikagunaratne.wordpress.com/2011/03/26/1-2-an-introduction-to-subjects-of-international-law/>.

¹⁰⁷⁰ R. Kolb, *The International Court of Justice*, A & C Black, 2014.

¹⁰⁷¹ *East Timor Case, Portugal v. Australia*, I.C.J. Reports 1995, 90.

Indonesia's rights in East Timor in the absence of Indonesia's consent.¹⁰⁷²

4.6 Proceedings

Proceedings before the ICJ closely resemble proceedings in municipal courts. They are governed by the Statute and the Rules that the ICJ adopts. Parties make oral and written submissions. Proceedings are in English and French, which are the ICJ's two official languages. Judges intervene less in the proceedings than typical common-law judges. Evidence produced in court is, for the most part, documentary. At times, it is necessary for the parties to call in witnesses. In recent years, the Court has heard cases with highly intricate facts, such as the dispute involving Congo and Uganda,¹⁰⁷³ where political, economic, ethnic and historical factors fuelled the conflict that led to the dispute.

It has happened that defendant states refused to appear before the Court. In such situations, the Court usually decides in favour of the plaintiff state when that state provides the Court with adequate justifications in law and in fact for a favourable decision.

4.7 Provisional measures and final judgments

The ICJ can also issue provisional measures.¹⁰⁷⁴ In the past, many states treated provisional measures as non-binding. In *LaGrand*,¹⁰⁷⁵ the ICJ held provisional measures were binding.

Today, the Court can issue these measures when necessary to "preserve the respective rights of either party" to the dispute.¹⁰⁷⁶ Provisional measures are in fact temporary injunctions. The ICJ can make such an order even if it is not yet sure that it has jurisdiction in the matter. It can grant provisional order if it has *prima facie* jurisdiction over a dispute.¹⁰⁷⁷

¹⁰⁷² *East Timor Case, Portugal v. Australia*, I.C.J. Reports 1995, 90. Paragraphs 34-38.

¹⁰⁷³ *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda, Judgment, Merits*, [2005] ICJ Rep 168 paragraph 26.

¹⁰⁷⁴ Article 41(1) of the ICJ Statute, 1945.

¹⁰⁷⁵ *LaGrand (Germany v United States)*, I.C.J. Reports 2001, 466, paragraph 109.

¹⁰⁷⁶ Article 41 of the ICJ Statute, 1945.

¹⁰⁷⁷ *Legality of the Use of Force (Yugoslavia v Belgium) Provisional Measures* 1999 ICJ Reports 132 (para 21).

In *LaGrand*, Germany brought an application against the US to prevent the execution of convicted German nationals who were permanent residents in the US. It successfully requested the ICJ to issue provisional measures to ensure that the US would not execute the German nationals while the case before the ICJ was still pending. The court granted Germany's request on March 3rd, 1999, but the US nonetheless executed the German nationals on that same day. Though provisional measures are certainly desirable, the danger with the 2001 *LaGrand* decision is that states may quickly commence legal action before the ICJ on flimsy grounds but with the hope of getting provisional measures.

Regarding the Court's judgments, they are "final and without appeal".¹⁰⁷⁸ In addition, these "final" judgments are binding.¹⁰⁷⁹ Nevertheless, a party can apply for a "revision" of a final judgment, but only subject to specified conditions, namely the discovery of a fact that is "decisive".¹⁰⁸⁰ In short, it is possible for the ICJ to reconsider the dispute if new evidence is brought to light.¹⁰⁸¹

The judgment can take on several forms, such as declaratory judgments; reparation; and satisfaction, including assurances of non-repetition. Although states do not always comply with judgments of the ICJ, the level of compliance with such judgments is high.¹⁰⁸²

5. The South West Africa/Namibia cases before the ICJ

5.1 Factual background

The South West Africa/Namibia's dispute with South Africa occupied the minds of officials at the UN for about four decades.¹⁰⁸³

¹⁰⁷⁸ Article 60 ICJ Statute.

¹⁰⁷⁹ G. K. MacDonald and O. Q. Swaak-Goldman, 'Substantive and procedural aspects of international criminal law. 1. Commentary' in A. G. Karibi-Whyte (eds.) *Appeal Procedures and Practices* (BRILL 2000) 631.

¹⁰⁸⁰ See Article 61 ICJ Statute.

¹⁰⁸¹ A. P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) 18, 5 *European Journal of International Law* 815-852.

¹⁰⁸² J. Dugard, *International Law, A South African Perspective* (4th edn, Juta and Company (Pty) Ltd 2011) 466 – 467.

¹⁰⁸³ From 1949 when representatives of South West Africa commenced their first suit before the International Court of Justice to 1990 when Namibia achieved political independence. See also S. N. Ashpala, *Diplomacy in Armed Struggle: A Case*

To grasp the South West Africa cases and the value they added to international law, you must first gain some understanding of the events that led up to the cases. The geographical area known as South West Africa was originally colonized by Germany in the late 19th century. During and after World War I, the Union of South Africa sought to gain exclusive control over the German colony.¹⁰⁸⁴ During the War, its troops invaded South West Africa.

After World War I, a Mandate of South West Africa was conferred upon “His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa.” South Africa was responsible directly to the League for proper administration of the mandated territory. Under this Mandate, the Union was to have full power of administration over the territory and was to apply its own laws and legislation.¹⁰⁸⁵

However, South Africa’s broad powers in terms of the Mandate were restricted:¹⁰⁸⁶

The Mandatory shall have full power of administration and legislation over the Territory subject to the present Mandate as an integral portion of the Union of South Africa; and may apply the laws of the Union of South Africa to the Territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

South Africa’s powers were therefore limited by the Mandate itself and the general duty on South Africa to “promote to the utmost the material and moral well-being and the social progress” of Namibians.

However, South Africa did not adhere to these restrictions. The people from South West Africa suffered great injustices and

of the South West Africa People’s Organisation (Swapo), A Thesis Submitted in Partial Fulfilment of Master of Arts of the University of Namibia, 2014, 7.

¹⁰⁸⁴ The South West Africa Cases (1967) 2, *Washington University Law Review*. Available at:

http://openscholarship.wustl.edu/law_lawreview/vol1967/iss2/3.

¹⁰⁸⁵ *ibid*.

¹⁰⁸⁶ Article 2 of the Mandate of South West Africa.

atrocities, notably the effects of apartheid, under the rule of the Mandatory;¹⁰⁸⁷ so much so that by the time the UN was established the international community demanded that the UN revoke South Africa's status as 'mandatory' and 'administrator' of South West Africa.

5.2 The first advisory opinion

The request for an advisory opinion, filed at the end of 1949, posed a series of specific questions; all, in effect, varied aspects of the key question concerning the exact legal status of South West Africa.¹⁰⁸⁸

The first question was: What is the international status of South West Africa and what are the international obligations of the Union of South Africa arising from it, in particular:¹⁰⁸⁹

(a) Does the Union continue to have international obligations under the Mandate and, if so, what are those obligations?

(b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, too . . . South West Africa?

(c) Has the Union... competence to modify the international status of ... South West Africa, or, in the event of a negative reply, where does competence rest?

The following July, still in 1950, the court handed down a four-part opinion. On the general question of the territory's status, the Court held unanimously that "South-West Africa was a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920." The court went on to make three important rulings.¹⁰⁹⁰ First, South Africa continues to shoulder the international obligations stated in Article 22 of the Covenant and in the Mandate. Second, all the judges agreed that the trusteeship provisions of the Charter were available for Namibia, but the

¹⁰⁸⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, 16, paragraphs 128-132.

¹⁰⁸⁸ E. S. Landis, 'South West Africa in the International Court Act II, Scene 1' (1964) 49 *Cornell Law Review* 179, 189-190.

¹⁰⁸⁹ *ibid.*

¹⁰⁹⁰ *ibid.*

majority of the Court held that these provisions “do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System.” Lastly, the court held that South Africa was not competent to modify unilaterally the “international status” of Namibia, but that such competence “rest[ed] with the Union of South Africa, acting with the consent of the United Nations.”

5.3 Ethiopia and Liberia versus South Africa

On November 4th, 1960, Ethiopia and Liberia filed an application against South Africa.¹⁰⁹¹ On May 20th, 1961, the Court joined the proceedings in the two cases. South Africa raised preliminary objections to the Court’s proceeding to hear the merits of the case, but these were dismissed by the Court on 21 December 1962, the Court finding that it had jurisdiction to adjudicate upon the merits of the dispute.

Ethiopia and Liberia, acting in their capacity as members of the former League of Nations, put forward various allegations of contraventions of the League of Nations Mandate for South West Africa by South Africa. They raised a number of legal issues, including:¹⁰⁹²

1. whether the Mandate for South West Africa was still in force; and, if so,
2. whether South Africa had, in accordance with the Mandate, promoted to the utmost the material and moral well-being and the social progress of the inhabitants of the territory;
3. whether South Africa had contravened the prohibition in the Mandate on the “military training of the natives” and the establishment of military or naval bases or the erection of fortifications in the territory; and
4. whether South Africa had contravened the provision in the Mandate that it (the Mandate) can only be modified with the consent of the Council of the League of Nations, by attempting to modify the Mandate without the consent of the United Nations General

¹⁰⁹¹ *South-West Africa Cases (Second Phase)*, ICJ Judgment of 18 July 1966.

¹⁰⁹² *ibid.*

Assembly, which had replaced the Council of the League for this and other purposes.

Before dealing with these questions, however, the Court considered that it had to answer two prior questions that may make any enquiry into other aspects of the case unnecessary. One was whether the Mandate still subsisted at all and the other was the question whether Ethiopia and Liberia had standing in this phase of the proceedings.¹⁰⁹³

The court held that the Mandate subsisted, but that Ethiopia and Liberia had not established any legal right or interest in the matter. This ruling on legal standing of Ethiopia and Liberia directly contradicted the Court's holding in the earlier phase of the case, where it stated that Ethiopia and Liberia were competent to bring the application against South Africa. (The two separate applications by Ethiopia and Liberia were then consolidated into one single case.) The court reversed its earlier decision on the ground that Ethiopia and Liberia failed to establish that they had *locus standi*.

The ICJ's decision in that case revealed a flaw in international law. At the time of that decision, obligations *erga omnes* did not avail. And it is precisely in reaction to the ICJ's decision in the *South-West Africa Cases (Second Phase)* that the international community embraced obligations *erga omnes*, which entitle any state to bring a matter before the ICJ when another state infringe those obligations, for instance, people's right of self-determination.

5.4 South Africa's continued occupation

Claiming that it had the right to annex the Namibian territory and that Namibia's nationals desired its rule, South Africa began the occupation of Namibia. The UN adopted Resolution 2145, which revoked South Africa's Mandate. Later on, the Security Council adopted Resolution 276 (1970), which declared the continued presence of South Africa in Namibia illegal. South Africa ignored those resolutions. An advisory opinion was thus requested from the ICJ.¹⁰⁹⁴

¹⁰⁹³ *ibid.*

¹⁰⁹⁴ *I.C.J., Advisory Opinion, 1971, I.C.J. Rep 16.* Available at

The Court ruled that UN member states are bound by UN mandates and that violations or breaches result in a legal obligation on the part of the violator to rectify the violation and on the part of other member states to refrain from aiding the violator in its wrongful conduct. Specifically, the General Assembly determined that South Africa contravened its Mandate because of its deliberate and persistent conduct in further occupying Namibia.¹⁰⁹⁵

Despite agreeing with the UN to restore independence to Namibia, South Africa did not stick to its commitments. Accordingly, the General Assembly imposed mandatory sanctions for enforcement against South Africa and strongly condemned its behavior.¹⁰⁹⁶

<http://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-3/advisory-opinion-on-namibia/>.

¹⁰⁹⁵ *ibid.*

¹⁰⁹⁶ See *ibid.*

IMMUNITY

Even when states have formally declared that they recognize or consent to the jurisdiction of an international or domestic court, one of the parties to a dispute may prevent that court from effectively exercising jurisdiction by filing an objection that it enjoys immunity. Reportedly, the question of immunity appears before national courts more often than any other questions of international law.¹⁰⁹⁷ Questions of immunity routinely arise in the context of adjudication. And, under international law, the rules on immunity and those on state responsibility depend on one another in some measure.¹⁰⁹⁸

When a party pleads immunity successfully, a state will not have jurisdiction over a foreign sovereign, his property or his agents. It will also not be able to arrest or detain the foreign sovereign. Local law will still apply to the foreign sovereign, his property or his agents, but the host state will not be able to exercise its territorial jurisdiction over him.

Parties characteristically raise immunity as a bar to jurisdiction.¹⁰⁹⁹ Well-known cases have included ships or other property located within the territorial jurisdiction of another state.¹¹⁰⁰ In *Rukoro*, a federal court in New York declined to assert jurisdiction over the genocide-reparations claims made by representatives of the Ovaherero and Nama communities on the ground that it lacked jurisdiction over Germany.¹¹⁰¹

In Namibia, wilfully or negligently suing a person entitled to sovereign immunity or executing any legal process against such a person constitutes a criminal offence.¹¹⁰² In *Mazila v the Government of*

¹⁰⁹⁷ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen 2003) 357.

¹⁰⁹⁸ A. Orakhelashvili, 'Responsibility and Immunities' (2014) 11 *International Organization Law Review* 116-118.

¹⁰⁹⁹ I. Brownlie, *Principles of Public International Law* (6th edn, Oxford 2003) 362.

¹¹⁰⁰ *ibid.*

¹¹⁰¹ *Vekuii Rukoro and Others v Federal Republic of Germany* [2019] US District Court, Southern District of New York.

¹¹⁰² Section 11(1) of the Diplomatic Privileges Act, 71 of 1951.

the Islamic Republic of Iran, the High Court of Namibia refused to exercise jurisdiction over the case after two defendants, the Iranian government and one of its employees in Namibia, raised the defence of immunity.¹¹⁰³

Immunity from jurisdiction, whether regarding a state or its diplomatic representatives, stems from the requirement under international law to respect the sovereignty and political independence of other states.¹¹⁰⁴ Simply put, the rationale behind this immunity or bar to jurisdiction lies in policy, comity, and the equality of states. The Supreme Court of the United States stated the classic rationale of immunity in *The Schooner Exchange v McFaddon*, where Chief Justice John Marshall said:¹¹⁰⁵

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Immunity thus emanates from two related notions, namely the equality and independence of states.¹¹⁰⁶ The equality of states implies that local courts will not subject a foreign sovereign to the jurisdiction of another state. It is on the basis of these two notions that courts accept the validity of acts, including legislation, by other states and their agents.¹¹⁰⁷

Immunity remains a controversial aspect of international law.¹¹⁰⁸ And courts have occasionally refused to recognize the validity of acts by foreign states that they regard as violating international law or as contrary to local laws or policies.¹¹⁰⁹ I canvass these occasional circumstances in the section on the ‘acts of state’ doctrine below.

¹¹⁰³ *Mazila v The Government of the Islamic Republic of Iran* (A 13/2015) [2015] NAHCMD 24 (13 February 2015).

¹¹⁰⁴ M. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 621.

¹¹⁰⁵ (1812), 7 Cranch 116.

¹¹⁰⁶ Brownlie *op cit* 325.

¹¹⁰⁷ *ibid.*

¹¹⁰⁸ *ibid* 325.

¹¹⁰⁹ *ibid.*

Immunity attaches to two categories of persons. It attaches to heads of state and government, departments of that government, and senior government officials.¹¹¹⁰ This is referred to as ‘sovereign immunity’. Immunity also attaches to diplomats and consuls. This is referred to as ‘diplomatic immunity’.

1. Sovereign immunity

The doctrine of sovereign immunity arose as one of the earliest principles of international law.¹¹¹¹ Sovereign immunity attaches to the foreign sovereign, his or her property or agents. The state embodies the foreign sovereign.

In 2004, the General Assembly of the United Nations adopted the Convention on Jurisdictional Immunities of States and Their Property.¹¹¹² That Convention accepts a general immunity for states, including their various organs, constituent units, and political subdivisions. But the Convention also recognizes a number of exceptions, notably when a state conducts activities that are commercial in nature.¹¹¹³ Only a few states ratified the Convention, though. For that reason, parties must still look to the domestic law of each state to determine how that state applies the doctrine of sovereign immunity.¹¹¹⁴ That low ratification rate suggests that Convention’s rules have not yet morphed into international custom.

Immunity can be absolute or qualified. It is absolute when the law immunizes a foreign state from liability for its acts in a domestic court under any circumstances whatsoever. In other words, with absolute immunity, a foreign court cannot assert its jurisdiction over a state without that state’s consent.¹¹¹⁵ Contrarily, immunity is qualified, restricted or relative when specific rules or exceptions limit

¹¹¹⁰ C. Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 29.

¹¹¹¹ T. Buergenthal and S.D. Murphy, *Public International Law in a Nutshell* (5th edn, West 2013) 244.

¹¹¹² Convention on Jurisdictional Immunities of States and Their Property, (2005) 44 I.L.M. 801.

¹¹¹³ Article 10 of the Convention on Jurisdictional Immunities of States and Their Property, 2004.

¹¹¹⁴ Buergenthal and Murphy op cit 244-245.

¹¹¹⁵ X. Yang, *State Immunity in International Law* (Cambridge University Press 2012) 7.

the scope of its application. However, as Yang notes, states never treated immunity as truly absolute: From the very beginning, a number of exceptions narrowed its scope.¹¹¹⁶ After all, a state could always voluntarily submit to the jurisdiction of a foreign court. This realization entails that the dichotomy between absolute and restrictive immunity is, for the most part, meaningless.

All the same, in the past, the view of immunity as absolute prevailed. Today, however, most states qualify the scope of immunity within their domestic legal systems. The emergence of human rights has restricted sovereign immunity under international law. A foreign sovereign guilty of serious and massive violations of human rights can no longer confidently expect courts to grant it sovereign immunity.¹¹¹⁷

The majority of states now tend to favour the restrictive immunity approach.¹¹¹⁸ Initially, those states came from the West whereas those who chose the absolute approach were mostly socialist and developing states, such as China, the Union of Soviet Socialist Republics (U.S.S.R.), and India.¹¹¹⁹ Domestic legislation also expresses this restrictive tendency.¹¹²⁰ In Namibia, the Diplomatic Privileges Act, 71 of 1951, embraces the restrictive theory. So does, in the United Kingdom (UK), the State Immunity Act of 1978.

However, the restrictive approach does not solve problems in practice as they do not provide uniform solutions, especially because the absolute approach also admits several exceptions.¹¹²¹ This is another way of saying that the jurisprudence on sovereign immunity varies across national jurisdictions. Despite the trend towards the qualified or restrictive approach to immunity, some countries still follow the absolute approach.¹¹²² To compound matters further,

¹¹¹⁶ *ibid* 10.

¹¹¹⁷ P. Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997) 125.

¹¹¹⁸ Shaw *op cit* 630.

¹¹¹⁹ D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 258.

¹¹²⁰ Shaw *op cit* 630.

¹¹²¹ Brownlie *op cit* 333.

¹¹²² *ibid* 331.

states that have adopted the restrictive perspective do not always apply it to enforce decisions, such as seizing foreign assets.¹¹²³

In practice, simply distinguishing between the absolute approach and the restrictive approach does not solve problems related to immunity.¹¹²⁴ In the final analysis, whether a court applies the absolute or the restrictive approach, the question ultimately turns on determining the nature of the entity entitled to immunity.¹¹²⁵ In *Trendex Trading Corporation Ltd v. Central Bank of Nigeria*, the judge warned against attributing immunity easily, especially in view of the fact that, as governmental functions keep expanding nowadays, such attribution will put claimants at a disadvantage vis-à-vis defendants.¹¹²⁶

It is useful to distinguish between immunity *ratione personae* (i.e., immunity relating to the status of the defendant) and *ratione materiae* (i.e., immunity relating to the subject matter). Immunity *ratione personae* attaches to the person of the Head of State and senior government officials.¹¹²⁷ A head of state and senior government officers may claim this immunity while they still hold office. Immunity *ratione materiae*, on the other hand, attaches to the official acts performed by government officials. Government officials can claim this immunity even after they have left office.

1.1 Official governmental versus commercial activities

With more and more states adopting the restrictive immunity doctrine, it has become necessary to distinguish between acts that benefit from immunity and those that do not.¹¹²⁸ The basic approach embraced in domestic legislation recently has been to grant immunity in general and then to list a number of exceptions such that the onus rests on the other party to prove that the act in question fell within the exceptions.¹¹²⁹ The Convention on Jurisdictional Immunities of

¹¹²³ *ibid.*

¹¹²⁴ *ibid.*

¹¹²⁵ Shaw *op cit* 649.

¹¹²⁶ [1977] 2 WLR 356, 383; 64 ILR, pp. 122, 147.

¹¹²⁷ J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014) 28.

¹¹²⁸ Shaw *op cit* 630.

¹¹²⁹ *ibid* 632.

States and Their Property adopted in 2004 follow the same approach.¹¹³⁰

Courts now differentiate between a foreign state that acts in an official and one that acts in a commercial capacity. They grant full immunity to official government activities (*jure empirii*). By contrast, they do not grant immunity when a foreign state engages in commercial activities (*jure gestionis*). The rationale for this distinction is that a state acting in a commercial capacity behaves like any other agent in the economy. Immunity law should therefore treat the state acting in that capacity accordingly.

With regard to the commercial activities of states, Article 2(2) of the 2004 Convention stipulates that:

[i]n determining whether a contract or transaction is a ‘commercial transaction’... reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the state which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.

This ‘nature’ test was incorporated to protect developing nations as they seek to spur national economic development.¹¹³¹ The test involves one or two steps, depending on the practice of a particular state. First, the inquiry relates to the purpose if the state in its domestic practice relies on purpose to determine the character of contracts and transactions. The representative of a foreign state must seek to advance the interests of his or her state before immunity can avail him or her.¹¹³² Second, the inquiry relates to the nature of the contract or transaction. The act must be “of its own character a governmental act, as opposed to an act which any private citizen can perform”.¹¹³³

States choose to restrict sovereignty for at least two main reasons. First, it proves necessary in the interest of justice to individuals

¹¹³⁰ See Article 5 of the Convention on Jurisdictional Immunities of States and Their Property, 2004.

¹¹³¹ Shaw op cit 633.

¹¹³² *I Congreso del Partido*, [1983] 1 A.C. 244 (the House of Lords quoted, with approval, the test for governmental act formulated by the trial court judge).

¹¹³³ *ibid.*

having such transactions with states to allow them to bring such transactions before court; second, to require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or government act of that state.¹¹³⁴

In *I° Congreso del Partido*, the court held that, in determining whether they should grant immunity, courts must consider the whole context in which a defendant makes an immunity claim in order to identify the relevant facts on which the defendant bases his or her claim.¹¹³⁵ In that case, creditors from Chile brought suit in rem¹¹³⁶ in the English High Court against the Cuban state. They claimed that Cuba breached the contract that it entered into with them by failing to deliver the promised cargoes and that Cuba also committed a tort (i.e., conversion¹¹³⁷ or detainue¹¹³⁸). Thus, on the application of the Chilean creditors, British authorities arrested the *I Congreso*, a ship owned by the Cuban state, on British waters. Cuba raised the defence of state immunity. While the defence succeeded in the High Court, the House of Lords reversed that judgment on appeal.

Based on the specific factual context of the case, the House of Lords determined that Cuba had acted in its commercial capacity and that it did not perform a governmental act. The significance of the context, especially as a starting point of investigation and as a basis for the restrictive immunity doctrine, was highlighted by the Supreme Court of Canada in *United States of America v The Public Service Alliance of Canada and Others (Re Canada Labour Code)*.¹¹³⁹

1.2 Rukoro and Others v Federal Republic of Germany

Representatives of the Ovaherero and Nama communities brought this suit in the US against Germany to claim damages for the 1904-1908 genocide under the Alien Tort Claims Act¹¹⁴⁰ (the ‘*Rukoro*’

¹¹³⁴ *ibid.*

¹¹³⁵ [1983] AC 244, 267; 64 ILR, PP.307, 267; 64 ILR, pp.307, 18.

¹¹³⁶ The Latin phrase ‘*in rem*’ means that a party has brought a lawsuit or a legal action against property, and not a particular person.

¹¹³⁷ A person commits the tort of ‘conversion’ when he intentionally interferes with the property of another person.

¹¹³⁸ ‘Detinue’ is a legal action that provides a remedy for the wrongful detention of goods.

¹¹³⁹ (1992) 91 DLR (4th) 449; 94 ILR, p.264.

¹¹⁴⁰ Alien Tort Claims Act, 28 U.S.C. § 1350.

case).¹¹⁴¹ From a complaint filed on 5 January 2017 by members of the Ovaherero and Nama communities, judge Laura Swain noted the accounts of enslavement, concentration camps, stolen land, rapes of women and children, lynched and dissected bodies.¹¹⁴² From that complaint, she heard about human skulls lying alongside rib cages and thousands of fallen cattle in the Omaheke desert, retracing the path of those frightened steps who strove to escape German commander Adrian Dietrich Lothar von Trotha, hopelessly in a ‘march of death’ through the desert.

Yet, for the horror of the genocide, the judge quickly remarked that “strong moral claims are not easily converted into successful legal causes of action”.¹¹⁴³ Indeed, with the judgement she handed down on 6 March 2019,¹¹⁴⁴ the federal court dismissed the *Rukoro* case. At issue in that matter was whether that court had jurisdiction to order that Germany pay damages for the genocide of the Ovaherero and Nama indigenous people in German South West Africa from 1885 to 1909. Germany, through its lawyer, maintained that the federal district court lacked subject-matter jurisdiction under the political doctrine question and, alternatively, that it lacked both

¹¹⁴¹ *Vekuii Rukoro and Others v Federal Republic of Germany* [2019] US District Court, Southern District of New York 3-4. Hereinafter the ‘*Rukoro*’ case.

¹¹⁴² I adapted this summary of the *Rukoro* case from D. Zongwe and B. Tjatjara, ‘The Bones of Contention in the Ovaherero-Nama Genocide Case’ *The Namibian* (Windhoek, 15 March 2019) 10.

¹¹⁴³ *Rukoro* 6.

¹¹⁴⁴ *Rukoro* 4-5.

subject-matter and personal jurisdictions under the doctrines of *forum non conveniens*¹¹⁴⁵ and prudential exhaustion^{1146 1147}.

Thus, the judge analyzed the facts relating to the genocide only to the extent that they helped her decide whether the court had jurisdiction; she did not delve into the facts to determine whether they truly happened. In other words, the court proceedings never moved to the stage of determining the truth of the claims made in the complaint (the trial stage); instead, they remained stuck in a preliminary dispute over the court's legal powers.

The law which mostly applied to the *Rukoro* case, the Foreign Sovereign Immunities Act ('FSIA'), allows US federal courts to bypass the immunity of foreign states in exceptional circumstances.¹¹⁴⁸ One such circumstance, the 'takings exception,' formed the real basis of the complaint. It arises when a foreign state violates international law by forcibly 'taking' (i.e., by expropriating) property outside the US, and later placing that property in the US to carry on a 'commercial activity' in the US.¹¹⁴⁹ The judge recalled that a state engages in a commercial activity when it acts "in the manner of a private player within the market".¹¹⁵⁰

The Ovaherero and Nama complainants argued that Germany acted as a "market maker", a "market participant", and a "major player" in the "business of bone display" and the "bone trade".¹¹⁵¹

¹¹⁴⁵ This doctrine applies mostly in common-law jurisdictions such as the US. It allows courts to stay or dismiss a case when they determine that another court may hear that case more appropriately. The doctrine gives courts wide discretion to determine whether a more appropriate court or forum exists and, if so, whether to stay or dismiss that case in favour of the other forum. See R.A. Brand, 'Forum non conveniens', *Max Planck Encyclopedia of Public International Law* (2019) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e28>> accessed 31 March 2019.

¹¹⁴⁶ 'Prudential exhaustion' requires that a plaintiff exhaust adequate and available remedies where the place occurred. Only if such remedies do not avail, could a plaintiff bring a claim under the Alien Tort Claims Act. R.A. Ghatan, 'The Alien Tort Statute and Prudential Exhaustion' (2011) 96 *Cornell Law Review* 1273, 1282-1283. See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (holding that claims under the Alien Tort Claims Act require prudential exhaustion).

¹¹⁴⁷ *Rukoro* 2.

¹¹⁴⁸ Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. Hereinafter 'FSIA'.

¹¹⁴⁹ FSIA, 28 U.S.C. § 1605(a) (3).

¹¹⁵⁰ *Rukoro* 17.

¹¹⁵¹ *Rukoro* 19.

They maintained that Germany used four properties in New York to fulfil contractual obligations (housing, maintenance, and insurance), and to propagate German culture and develop American interest in Germany with the end-goal of promoting “commercial growth through cultural growth”.¹¹⁵² Germany, through its lawyer, countered that the complainants failed to prove that it purchased the properties to carry on commerce in the US.

The judge rejected the “well-pleaded” contention and the solid documentary evidence presented by the complainants’ lawyers because, she reasoned, Germany uses the four properties principally as private residence for its diplomats or other entities engaged in propagating German culture, such as the Goethe Institute.¹¹⁵³ She also rejected it because using properties to support cultural exchange and arts programmes does not amount, in her view, to commercial activities.¹¹⁵⁴ In the result, the court dismissed the Ovaherero-Nama complaint because it lacked subject-matter jurisdiction in terms of the FSIA exceptions.

On the magnified lens, the ruling in *Rukoro* suffers from one key inconsistency. Earlier, the judge said that in determining what act qualifies as ‘commercial’, it is the nature, and not the purpose, of the act that counts.¹¹⁵⁵ Yet, later, she threw out the complainants’ arguments on the grounds that Germany uses the properties for “the primary purposes” of housing its diplomats and other personnel.¹¹⁵⁶ As explained above, the ‘nature’ test requires that an act be “of its own character a governmental act, as opposed to an act which any private citizen can perform”.¹¹⁵⁷ This point could make all the difference. Indeed, a party can plausibly submit that housing, maintenance and insurance fall in the category of acts which a private citizen can perform.

¹¹⁵² *ibid.*

¹¹⁵³ *Rukoro* 17-20.

¹¹⁵⁴ *Rukoro* 20.

¹¹⁵⁵ *Rukoro* 17. This position resembles Article 2(2) the Convention on Jurisdictional Immunities of States and Their Property, 2004, although the test in Article 2(2) first inquires whether the state in question looks at the purpose of the government act in dispute. This first inquiry would not apply to the *Rukoro* case because US appears to focus on the nature of the act, and not on its purpose(s).

¹¹⁵⁶ *Rukoro* 17-18.

¹¹⁵⁷ See *I Congreso del Partido*, [1983] 1 A.C. 244.

1.3 *Mazila v The Government of the Islamic Republic of Iran*

In *Mazila*, the applicant urged the High Court of Namibia to apply the restrictive doctrine of sovereign immunity.¹¹⁵⁸ Mazila was evicted without a court order from the building, a mosque, he had been living in with his wife. He approached the High Court for a *mandament van spolie* (i.e., an old common-law remedy where somebody has been dispossessed without following due legal procedure). Mazila and his wife claimed that they belonged to a Muslim foundation that held prayer sessions in the mosque and that Mazila administered the mosque in a voluntary capacity.

The first respondent, the government of Iran, was the registered owner of the building where the mosque was located. The second respondent, an employee of the government of Iran, managed to have Mazila and his wife evicted without a court order.

At the hearing of the urgent application, the two respondents raised the defence of sovereign immunity. The Court accepted the defence. Accordingly, it held that it had no jurisdiction because the respondents enjoyed immunity by virtue of the Diplomatic Privileges Act of 1951 and international law.

Mazila submitted that the Court had to apply restrictive sovereign immunity because the first and second respondents had engaged in trade and commercial transactions. The court noted that Mazila and his wife were not ‘renting’ the mosque, nor were they relying on any agreement, written or oral, between them and the respondents. The court thus rejected Mazila’s submission:¹¹⁵⁹

That being the case, it cannot be suggested that the applicants and the first and second respondents were engaged in trade or commercial transactions to vindicate the application of the restrictive doctrine of sovereign immunity.

¹¹⁵⁸ *Mazila v The Government of the Islamic Republic of Iran* (A 13/2015) [2015] NAHCMD 24 (13 February 2015).

¹¹⁵⁹ *ibid* [21].

1.4 Criminal proceedings

Courts may disregard the immunity of a foreign sovereign during criminal proceedings or civil proceedings.¹¹⁶⁰ Starting with criminal matters, several international legal instruments do not recognize sovereign immunity for the most serious international crimes.¹¹⁶¹ For example, the Rome Statute establishing the International Criminal Court does not accept the defence of sovereign immunity when the Court's Prosecutor suspects that a foreign sovereign committed crimes falling under the Court's jurisdiction, namely war crimes, crimes against humanity, genocide and aggression.¹¹⁶² Thus, Charles Taylor, the President of Liberia, failed in his attempt to raise sovereign immunity as a defence in the Special Court for Sierra Leone.¹¹⁶³

In the African context, sovereign immunity has become absolute after AU member states adopted the Malabo Protocol. In June 2014, the AU amended the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) to prohibit the African Court of Justice and Human Rights from commencing or continuing any charge against any sitting Head of State or any other senior government official during their tenure of office.¹¹⁶⁴

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during tenure of office.

¹¹⁶⁰ S. Knuchel, 'State Immunity and the Promise of *Jus Cogens*' (2011) 9 *Northwestern Journal of International Human Rights* 149.

¹¹⁶¹ S. Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016) 145.

¹¹⁶² Article 27 of the Rome Statute Establishing the International Criminal Court, 1998, U.N. Doc. A/CONF. 183/9; 37 I.L.M. 1002 (1998); 2187 U.N.T.S. 90.

¹¹⁶³ J. Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts' (2011) Chatham House Briefing Paper IL BP 2011/02

<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf> accessed 21 November 2018.

¹¹⁶⁴ Article 46A bis of the Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, 2014.

I have doubts about the wisdom of the Malabo Protocol because often the person responsible for ordering mass atrocities sits at the highest level of government.

Sovereign immunity applies differently in municipal law. The International Court of Justice (ICJ) stated that customary international law still recognizes sovereign immunity before national courts.¹¹⁶⁵ The ICJ ruled that Belgium had violated the sovereign immunity of Mr. Abdulaye Ndombasi Yerodia. Mr. Yerodia served as a minister of foreign affairs in the DRC when Belgium issued a warrant for his arrest because he incited racial hatred in August 1998 against Tutsis during the Second Congolese War.¹¹⁶⁶ Several jurists did not agree with that outcome and criticized it. Much of the criticisms maintain that the ICJ could have ruled that Belgium had the right to exert jurisdiction over Yerodia on the basis of universal jurisdiction since the Belgian court in question charged him with offences constituting war crimes and crimes against humanity.¹¹⁶⁷

Another controversy arose as a result of the South African government's decision to grant immunity to the First Lady of Zimbabwe, Grace Mugabe, after she allegedly hit her son's girlfriend with an electrical extension cord in a hotel in Sandton, Johannesburg. Although Mrs. Mugabe was apparently not in South Africa in any official capacity, the South African government decided to grant the wife of the Zimbabwean President 'derivate immunity', meaning immunity derived from that of her husband. In reaching this decision, the government in Pretoria said it considered several factors, including relations between South Africa and Zimbabwe. Yet the notion of 'derivate immunity' has no basis in the South African Diplomatic Immunities and Privileges Act.¹¹⁶⁸

The Mugabe incident shows that political calculations sometimes preside over the granting of immunity. It is highly debatable whether Mrs. Mugabe landed on South African soil in any official capacity, whether she held any official government position in her home

¹¹⁶⁵ A. Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2014) 140.

¹¹⁶⁶ A.L. Zuppi, 'Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice' (2003) 63 Louisiana Law Review 309.

¹¹⁶⁷ Zuppi op cit 309-310.

¹¹⁶⁸ Diplomatic Immunities and Privileges Act, 37 of 2001 (South Africa).

country, and whether the acts she performed fell within the scope of her government functions, if any. Yet the South African government extended immunity to the Zimbabwean First Lady, never mind the fact that the complainant or victim was a South African national.

1.5 Civil proceedings

Plaintiffs can also sue a foreign state in civil proceedings, even where victims of international crimes seek civil remedies in a local court for crimes of which a court has convicted the foreign state.¹¹⁶⁹ But, generally speaking, domestic courts grant absolute immunity to foreign sovereigns in civil proceedings.¹¹⁷⁰ I must, nonetheless, stress that the position of foreign sovereigns differs from that of diplomats, which I set out later in this chapter.

1.6 Acts of state doctrine

In the US, courts developed the ‘act of state’ doctrine. That doctrine encourages court to exercise restraint in the face of acts performed by a foreign state in its own territory. As a result, US courts usually refuse to sit in judgment of such acts.¹¹⁷¹ ‘Acts of state’ refer to the executive or administrative exercise of sovereign power by an independent state or its duly authorized agents as well as they denote legislative or administrative acts such as a statute, a decree, or an order.¹¹⁷²

Subsequently, many other states have adopted the US doctrine of ‘acts of state’ in the same or a modified version.¹¹⁷³ These adopters of the doctrine include the United Kingdom and Singapore.¹¹⁷⁴ The rationale behind this practice and theory of judicial restraint posits that the acts of foreign states performed with their own territory are

¹¹⁶⁹ D. Akande and S. Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 *European Journal of International Law* 815.

¹¹⁷⁰ E. Banks, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Springer 2005) 117.

¹¹⁷¹ *ibid.*

¹¹⁷² M. Zander, ‘The Act of State Doctrine,’ (1959) 53 *American Journal of International Law* 826.

¹¹⁷³ Buergenthal and Murphy *op cit* 259.

¹¹⁷⁴ See M. Mohan, ‘A Vanishing Silhouette: Acts of State Doctrine(s) and Interim Relief in Singapore’ (2016) 9 *Journal of East Asia and International Law* 234.

best mediated by diplomatic means, and not by means of litigation before national courts.¹¹⁷⁵ In *Underhill v Hernandez*, the US Supreme Court held that:¹¹⁷⁶

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

That said, states have from time to time refused to apply the acts of the state doctrine. In *Sabbatino*,¹¹⁷⁷ US courts did not recognize the decision by the Cuban government, taken on 6 August 1961, to nationalize all enterprises based in Cuba but in which US persons held a majority interest. The courts ruled that the nationalization of American-owned property in Cuba violates public international law and that US courts would therefore not recognize that nationalization.

2. Diplomatic immunity

It is in the interest of every state to exchange diplomats. For that reason, states consistently and strictly comply with the principles and rules regulating diplomatic immunity. Except for the Iran's hostage incident and a few other examples, international legal rules protecting diplomatic missions from the jurisdiction of the receiving state remain some of the most respected rules of international law.¹¹⁷⁸ These rules are also some of the oldest.¹¹⁷⁹ The ICJ held in *Diplomatic and Consular Staff* that "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies."¹¹⁸⁰

¹¹⁷⁵ Buergerthal and Murphy op cit 259.

¹¹⁷⁶ 168 U.S. 250 (1897), at 252. See also G. Biehler, *Procedures in International Law* (Springer 2005) 159.

¹¹⁷⁷ *Banco Nacional de Cuba v Sabbatino*, (1961) 193 F. Supp 375; (1962) 307 F. 2d 845.

¹¹⁷⁸ Janis op cit 371.

¹¹⁷⁹ *ibid.*

¹¹⁸⁰ 1979 I.C.J. Reports 7, 19.

The exchange of diplomats facilitates political and trade relations. It takes the form of diplomatic missions. Diplomatic missions comprise ambassadors and diplomats. They render diplomatic and consular services. Traditionally, diplomatic services deal with political relations between the sending state and the receiving state while consular services focus on trade relations between the sending state and the receiving state.¹¹⁸¹ Today, larger diplomatic missions blur that distinction because they combine both diplomatic and consular functions.¹¹⁸²

In Namibia, the Diplomatic Privileges Act of 1951, as amended, ('DPA') offers basic definitions of key concepts in sovereign immunity law. It defines a "diplomatic agent" as "the public representative of any other head of state or government duly accredited to [Namibia] as an ambassador, high commissioner, envoy extraordinary and minister plenipotentiary, minister resident, chargé d'affaires or accredited diplomatic representative."¹¹⁸³ Diplomatic "staff" or personnel includes counsellors, secretaries, attachés, advisers, chancellors, archivists, stenographers, typists and other persons approved by the Namibian Foreign Affairs Minister and who take part in the diplomatic work of a diplomatic mission, the consular work of a consular mission or the work of the office of a representative of another state or persons employed exclusively for the purposes of the mission or office."¹¹⁸⁴ Lastly, a "suite" refers to the family of any Head of State, diplomatic agent, visiting foreign-government representative, and other persons officially representing another state;¹¹⁸⁵ the term also includes people (and their families) who work for those foreign sovereigns, diplomatic agents and visitors.¹¹⁸⁶

¹¹⁸¹ G.R. Berridge, *Diplomacy: Theory and Practice* (5th edn, Macmillan 2015) 119.

¹¹⁸² J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 258.

¹¹⁸³ Article 1 of the Diplomatic Privileges Act, 71 of 1951, sv 'diplomatic agent'.

¹¹⁸⁴ Article 1 of the Diplomatic Privileges Act, 71 of 1951, sv 'staff'.

¹¹⁸⁵ Article 1 of the Diplomatic Privileges Act, 71 of 1951, sv 'suite'.

¹¹⁸⁶ *ibid.*

2.1 The 1961 Vienna Convention on Diplomatic Relations

No state can claim, as a right, diplomatic relations with other states. Likewise, a state has no obligation to maintain diplomatic relations with other states after those foreign states have established a diplomatic mission in its territory. But when states do choose to enter into relations with other states, they become obliged to observe certain international legal rules.

The 1961 Vienna Convention on Diplomatic Relations is the main treaty on diplomatic relations. It codifies the rules of customary international law governing how states should treat diplomats and diplomatic property.¹¹⁸⁷ More than 180 states ratified the 1961 Vienna Convention, which represents one of the most widely accepted international treaties.¹¹⁸⁸ The wide acceptance of the Convention shows that the rules protecting diplomatic missions are a matter of common concern to states from markedly different traditions.¹¹⁸⁹

The 1961 Vienna Convention centres on Article 29, which lays down that:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

The Convention revolves around Article 29 because the other provisions of the Convention revolve around and flow from the inviolability of foreign diplomats. For instance, agents of the receiving states may not enter foreign missions, except with the consent of the head of the mission.¹¹⁹⁰ Article 22 of the Vienna Convention provides that the premises of diplomatic missions are inviolable. In *DRC v Uganda*, the ICJ held that attacks by Congolese armed forces against the Ugandan diplomatic missions contravened Article 22 of the Vienna Convention. For a very long time, diplomatic missions were deemed extra-territorial. The argument was that diplomatic missions constituted extensions of the sending states.

¹¹⁸⁷ Buergenthal and Murphy op cit 233.

¹¹⁸⁸ Janis op cit 371-372; Buergenthal and Murphy op cit 233.

¹¹⁸⁹ Janis op cit 372.

¹¹⁹⁰ Article 22(1) of the Vienna Convention on Diplomatic Relations, 1961.

This view is no longer accepted.¹¹⁹¹ As the court also pointed out in the South African case of *Rodrigues*,¹¹⁹² the inviolability of the mission does not flow from the mission's supposed extraterritoriality but from the simple necessity for the mission to perform its legally authorized functions effectively.

Another principle flowing from the inviolability of a diplomatic agent held that the receiving state and no private individuals within the receiving state's territory can violate the private residence of a diplomatic agent¹¹⁹³ as well as the articles, documents¹¹⁹⁴ and official correspondence¹¹⁹⁵ of the mission. Diplomats carry diplomatic correspondence, articles and documents in diplomatic bags. The receiving state cannot open or detain diplomatic bags. Diplomatic missions have occasionally abused the inviolability of premises and diplomatic bags. In 1984, people inside the Libyan mission in London shot protestors demonstrating outside the mission. Nonetheless, receiving states may enter the premises of diplomatic missions and open diplomatic bags *by force* in cases of self-defence.

Typically, ambassadors head diplomatic missions. A *chargé d'affaires* can head a small diplomatic mission. The sending state selects the ambassadors and the diplomats it sends to receiving states. Before the head of a diplomat mission starts its duties, he must present his credentials to the head of the receiving state. In contrast, *chargés d'affaires* are accredited to the foreign affairs ministry of the receiving state.

Article 3 of the Vienna Convention on Diplomatic Relations enumerates the functions of diplomatic missions. These include representing the sending state and promoting friendly relations between the sending state and the receiving state. Diplomatic missions may also perform consular functions.

2.2 The immunities of diplomats

Diplomats are immune from prosecution and civil suits. 767 *Third Avenue Assoc. v Zaire* provides an example of immunity against

¹¹⁹¹ *S v Mharapara* 1986 (1) SA 556 (ZS) 558G-559B.

¹¹⁹² *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues* 2001 (1) SA 1285 (W) 1293E.

¹¹⁹³ Article 30(1) of the Vienna Convention on Diplomatic Relations, 1961.

¹¹⁹⁴ Article 24 of the Vienna Convention on Diplomatic Relations, 1961.

¹¹⁹⁵ Article 27 of the Vienna Convention on Diplomatic Relations, 1961.

civil suits.¹¹⁹⁶ In that case, a landlord sued the diplomatic mission of Zaïre (today the Democratic Republic of Congo) in the US for rent in arrears. A US federal court of appeals denied the landlord the right to evict the diplomatic mission from the premises because doing so would transgress the mission's inviolability.

The judge most probably erred in that case. The facts show that a contractual relationship tied the Zaïrian mission to the landlord. Put another way, the context indicates that Zaïre performed a commercial act in renting the premises. The judge should have disregarded the mission's plea of diplomatic immunity. Coming back to *Mazila*, the absence of a contractual agreement between the applicant and the respondents, that is precisely what led the High Court of Namibia to accept the respondents' defence of immunity. When the reasoning employed in *Mazila* is applied to *767 Third Avenue Assoc. v. Zaire*, it becomes clear that the judge should have allowed the landlord to sue the Zaïrian mission for the outstanding rents.

As I just explained, ambassadors and diplomats enjoy extensive immunities. The family members of a diplomat enjoy the same immunities. The Namibian Diplomatic Privileges Act defines 'family' as "the wife or husband, as the case may be, the minor children, and any other relative approved by the [Minister of Foreign Affairs] ... or of a member of the staff of any such person".¹¹⁹⁷

However, diplomats are not immune from all legal liability. The sending state may assert jurisdiction over its diplomats.¹¹⁹⁸ Stated differently, the home state of a diplomat and diplomatic personnel may sue them. The sending or home state may also waive the immunity of its diplomatic personnel.¹¹⁹⁹ If the sending state waives a diplomat's immunity, plaintiffs may sue that diplomat and local courts may exercise jurisdiction over that diplomat in the receiving state. If the ambassador representing State X in Namibia causes injury to a child in Windhoek, the child's parents may sue the ambassador and Namibian courts can decide the matter if State X waives that ambassador's immunity.

¹¹⁹⁶ 988 F.2d 295, 296 (2d Cir.1993).

¹¹⁹⁷ Article 1 of the Diplomatic Privileges Act, 71 of 1951, sv 'family'.

¹¹⁹⁸ Article 31(4) of the Vienna Convention on Diplomatic Relations, 1961.

¹¹⁹⁹ Buergenthal and Murphy op cit 234-235.

In addition, the receiving state may declare an ambassador or a diplomat *persona non grata*. That is what happened when some Rwandan diplomats were suspected of criminal activities against Rwandan exiles in South Africa: the South African government declared them *persona non grata*.¹²⁰⁰

2.3 The 1963 Vienna Convention on Consular Relations

The 1963 Vienna Convention on Consular Relations codifies customary international law on how states should treat consular officers and consulates.¹²⁰¹ Consular functions include the promotion of trade relations between the sending state and the receiving state, the issuing of passports to nationals of the sending state, the issuing of visas to nationals of the receiving state wishing to travel to the sending state, and the protection of nationals of the sending state who ran into certain difficulties in the receiving state.

Consuls enjoy a lower level of diplomatic protection than diplomats as they do not engage in political relations with the receiving state. Customary international law only recognizes two types of consular immunities, namely the inviolability of consular archives and the immunity of consuls for their official acts.¹²⁰² The 1963 Vienna Convention on Consular Relations codifies those immunities.¹²⁰³

Law enforcement agents may not detain or arrest a consular officer, except in cases of a grave crime. Unlike diplomats, consuls are not immune from the civil and criminal jurisdiction of local courts when they act in their personal capacity.¹²⁰⁴

¹²⁰⁰ P. Fletcher and H. Nyambura-Mwaura, 'South Africa, Rwanda Expel Diplomats in Row Over Rwandan Exiles,' *Reuters* (7 March 2014) <<https://www.reuters.com/article/us-safrica-rwanda-idUSBREA261BS20140307>> accessed 16 October 2018; A. Fakhoury, 'Persona Non Grata: The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State' (2017) 57 *Journal of Law, Policy and Globalization* 110.

¹²⁰¹ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹²⁰² Janis op cit 372-373.

¹²⁰³ Articles 33 (proclaiming the inviolability of consular archives) and Article 43 (providing for immunity from jurisdiction), Vienna Convention on Consular Relations, 1963.

¹²⁰⁴ Article 43(2) of the Vienna Convention on Consular Relations, 1963. See also Janis op cit 373. However, authorities in the receiving state may call upon consular employees to give evidence as witnesses in the course of judicial or

A sending state may appoint a local businessman or businesswoman as honorary consul in a receiving state. These appointments usually happen where the sending state does not have many interests in the receiving state.¹²⁰⁵ For instance, Canada has only an honorary consul in Namibia, but this does not necessarily mean that Canada has fewer interests in Namibia.

2.4 The Diplomatic Privileges Act of 1951 (Namibia)

The Diplomatic Privileges Act of 1951 (DPA)¹²⁰⁶ regulates sovereign and diplomatic immunities, rights and privileges in Namibia. It primarily aims to confer immunities as well as certain rights and privileges on Heads of State or Government and diplomats. The Minister of Foreign Affairs administers the DPA.

The DPA grants general immunity to Heads of State, diplomatic agents, and special envoys from another state,¹²⁰⁷ but it subjects that immunity to exceptions. Section 2 is pivotal. Subject to provisions on waivers, it grants immunity from the “civil and criminal jurisdiction of the courts” to Heads of State, diplomats, special envoys from other states, any organisation or institution recognised by the Namibian Foreign Affairs Minister, representatives of any government attending any international conference, and any other person recognised by the Minister. It is abundantly clear from section 2 of the DPA that the scope of immunity in Namibia is fairly broad.

However, a few exceptions limit the scope of the DPA. Thus, immunity does not apply where a diplomatic agent incurs liability for any personal income taxes or for taxes levied in connection with any transaction the agent entered into in his or her private or personal capacity.¹²⁰⁸

administrative proceedings: Article 44 of the Vienna Convention on Consular Relations, 1963.

¹²⁰⁵ Article 19 of the Vienna Convention on Consular Relations, 1963; and Optional Protocols.

¹²⁰⁶ Diplomatic Privileges, Act 51 of 1971.

¹²⁰⁷ Section 2(1) of the Diplomatic Privileges Act, 51 of 1971.

¹²⁰⁸ Section 3(1) of the Diplomatic Privileges Act, 51 of 1971.

2.5 Asylum in diplomatic missions

In many cases, political opponents of a ruling government have sought refuge in foreign diplomatic missions to escape perceived or real persecution. Support for granting diplomatic asylum on humanitarian, compassionate grounds is increasing. This practice may one day culminate into a clear rule of customary international law.¹²⁰⁹

Diplomatic missions have no legal obligation to grant diplomatic asylum.¹²¹⁰ In 1999, the South African High Commissioner handed over Zambian secessionist leader, Imasiku Mutangelwa, to the Zambian authorities. Mutangelwa had sought refuge at the residence of the South African High Commissioner to Zambia. In 2007, Jean-Pierre Bemba, a former Congolese Vice-President, ran to seek refuge in the South African diplomatic mission in Kinshasa, DRC, after an armed confrontation with the then newly elected President Joseph Kabila. Bemba eventually left the DRC for Portugal, thereby ending three weeks spent holed up in the South African embassy in Kinshasa.

3. How to analyse immunity cases

When conceptualizing immunity under international law, bear in mind that the liability of a foreign sovereign or a diplomat hinges on two factors, namely the status of the defendant and the nature of the act he allegedly performed. I represent graphically these two dimensions of immunity law in the following table:

PERSON			
ACT		STATE	DIPLOMATS
	OFFICIAL	Very strong immunity	Strong immunity
	PRIVATE OR COMMERCIAL	Moderate immunity	Weak immunity

¹²⁰⁹ See G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 355.

¹²¹⁰ L. Dembinski, *The Modern Law of Diplomacy: External Missions of States and International Organizations* (Martinus Nijhoff 1988) 250.

As this table shows, a person representing a foreign state and acting in an official capacity enjoys the strongest form of immunity. On the other hand, a diplomat who acts in a private or commercial capacity has the weakest form of immunity.

Remember, however, that this table over-generalizes and that the facts and merits of each case will dictate eventually how the courts should approach and solve immunity pleas. Other questions, for example, whether the forum is a domestic court or an international court, influence decisions on whether the court can exercise jurisdiction over the defendant.

Still, this table gives you a quick impression of the prospects of succeeding on a plea of immunity. For instance, it helps you determine that suggestions in the media that President Hage Geingob may end up appearing in court as a witness or as a party to the ongoing Areva corruption trial in France¹²¹¹ do not depict the likely course of events realistically. As you can see on the table, President Geingob enjoys a very strong level of immunity because he represents a foreign state currently. However, after his term expires, Geingob's immunity will depend on whether French investigating judges will have definitely established that – at the time of the alleged bribery or corrupt acts (2008-2009) – he performed an official act (as a member of parliament or as trade minister) or acted in a commercial or otherwise private capacity (as a consultant).

¹²¹¹ See “Illicit” French Payments Still Haunt Geingob’ *The Namibian* (Windhoek, 10 April 2018) 1.

THE UNITED NATIONS, PEACE AND THE USE OF FORCE

I speak of two major questions in this chapter: the United Nations in its roles as keeper and enforcer of peace. In the first half, I address myself to the functions of the United Nations (UN) in preventing and keeping international peace and security. In the other half, I discuss the use of force in international law and international affairs.

1. The United Nations and the maintenance of international peace

The downfall of the League of Nations and the tragedy of the Second World War inspired the creation of the UN.¹²¹² The League of Nations was disbanded in the wake of the Second World War. Given the expectation that the League would prevent a repeat of World War I, its failure to avert another world war prompted the League's demise.

Hoping that it would prove better and more forceful than its predecessor,¹²¹³ 51 countries signed the Charter of the UN on 24 October 1945. By signing that treaty, they founded the UN on that day with the intention that the UN would maintain international peace and security, which task is thus its *raison d'être*. Jouannet argues that, besides development and human rights, peace constitutes one of the three pillars of contemporary international law.¹²¹⁴ It surely is one of the primary purposes and ultimate goal of international law.¹²¹⁵

¹²¹² G. Torreblanca, 'The International Committee of the Red Cross and Human Rights Law' in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 550.

¹²¹³ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen 2003) 214.

¹²¹⁴ E.T. Jouannet, *A Short Introduction to International Law* (Cambridge University Press 2014) 65. In that sense, according to Jouannet, international law has assumed liberal and welfarist end-purposes.

¹²¹⁵ M.N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 914.

The UN has several tools and mechanisms to maintain peace and security.¹²¹⁶ It has the power to take collective action to prevent and eliminate threats to international peace and security.¹²¹⁷ It can also prevent conflicts by settling disputes.¹²¹⁸

This chapter focuses on the Security Council and the General Assembly as crucial decision-making bodies of the UN in maintaining international peace and security. In so doing, I occasionally refer to South West Africa/Namibia.

The UN remains the closest thing to a world government, though it is still far from it. At the very least, it offers an institutional framework for diplomacy and the moderation of international disputes.¹²¹⁹ The UN has six key organs, namely the Security Council, the General Assembly, the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice (ICJ).¹²²⁰ In this chapter, I only discuss the Security Council, the General Assembly, and the Secretariat. I delve into the ICJ in Chapter 12.

Alongside these principal organs, a plethora of other organs and committees work to achieve the UN's prime goals.¹²²¹ To support this massive bureaucracy extended to its 193 member states, the UN employs a personnel of about 44,000 men and women, 60% of which works in field operations across the globe.¹²²² However, the current

¹²¹⁶ See United Nations, 'Maintain International Peace and Security' <<http://www.un.org/en/sections/what-we-do/maintain-international-peace-and-security/>> accessed 22 November 2018.

¹²¹⁷ See United Nations, 'United Nations Shares Responsibility for Peace with Regional Organizations, Says Secretary-General, Opening All-Day Security Council Debate' <<https://www.un.org/press/en/2015/sc12011.doc.htm>> accessed 22 November 2018.

¹²¹⁸ See United Nations, 'Mediation Plays Vital Role in Preventing Conflicts, Settling Disputes – UN' <<https://news.un.org/en/story/2012/05/411572-mediation-plays-vital-role-preventing-conflicts-settling-disputes-un>> accessed 22 November 2018.

¹²¹⁹ Janis op cit 221.

¹²²⁰ Article 7 of the Charter of the United Nations, 1945.

¹²²¹ See United Nations, 'Funds, Programmes, Specialized Agencies and Others' <<https://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/>> accessed 23 November 2018.

¹²²² United Nations, 'Where We Are' <<https://careers.un.org/lbw/home.aspx?viewtype=VD>> accessed 14 October 2018.

size of UN personnel is lower than the roughly 60,000 people the UN employed by the early 2000s.¹²²³

1.1 The Security Council

Like the UN itself, the Security Council was created in 1945. The Council held its first session at Church House, Westminster, in London on 17 January 1946.¹²²⁴ After that inaugural session, the Council took permanent residence at the United Nations Headquarters in New York City, in the United States (US).¹²²⁵ Its first ever resolution requested the permanent members of the Council to direct their Chiefs of Staff to meet in London on 1 February 1946 and constitute the Military Staff Committee.¹²²⁶ (The UN Charter established a Military Staff Committee to advise and assist the Council.¹²²⁷)

In terms of decision-making powers, the Security Council stands as the highest political body of the UN. Still, the General Assembly is politically more representative than the Security Council because it houses the entire membership of the UN¹²²⁸ – a membership of 193 states.

The Security Council shoulders the primary responsibility to maintain international peace and security.¹²²⁹ The Council is in this regard the “most ambitious” organ of the UN.¹²³⁰ This responsibility also entails the power by the Security Council to investigate situations on its own.

The Security Council has 15 members: five permanent members and 10 non-permanent members.¹²³¹ The five permanent members are China, France, Russia, the United Kingdom (UK), and the US.¹²³² The five permanent members reflect the dominant powers at the end of World War II in 1945, when the Charter of the UN established

¹²²³ See Janis *op cit* 217.

¹²²⁴ United Nations Security Council, ‘What Is the Security Council?’ <<http://www.un.org/en/sc/about/>> accessed 27 November 2018.

¹²²⁵ *ibid.*

¹²²⁶ S.C. Res. 1, U.N. Doc. S/RES/1 (25 January 1946).

¹²²⁷ Article 47 of the Charter of the United Nations, 1945.

¹²²⁸ Article 9(1) of the Charter of the United Nations, 1945.

¹²²⁹ Article 24(1) of the Charter of the United Nations, 1945.

¹²³⁰ Janis *op cit* 215.

¹²³¹ Article 23(1) of the Charter of the United Nations, 1945.

¹²³² Article 23(1) of the Charter of the United Nations, 1945.

the Security Council. If the composition of the permanent members reflected the power relations today, a country such as Germany would have unsurprisingly sat in the Council as permanent member. The African Union (AU) has also requested “not less than two permanent seats” and five non-permanent seats.¹²³³ So far, however, the UN has not acceded to the AU’s requests.

Namibia subscribes to the AU’s position.¹²³⁴ For Namibia, the Security Council represents the least transformed principal organ of the UN.¹²³⁵ The Namibian government believes that the Security Council needs to grow into a more democratic and representative body and, accordingly, to increase its membership in both permanent and non-permanent seats.¹²³⁶

The General Assembly elects non-permanent members of the Council for two years from the entire membership of the UN, except the five permanent members. Namibia served as a non-permanent member of the Security Council from 1999 to 2000 and presided over the Council in August 1999 and October 2000.¹²³⁷ Theo Ben-Gurirab, a long-time senior civil servant and former Foreign Affairs Minister, represented Namibia before the UN during that period.

Article 24 of the Charter of the United Nations (UN Charter) provides for the general powers of the Security Council. The Security Council has the power to take decisions that legally bind all member states of the UN.¹²³⁸ But the veto power of permanent members trumps the Council’s power to take binding decisions. Permanent members can veto any resolution of the Security Council concerning

¹²³³ African Union, “The Common Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus”” (2005) <http://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf> accessed 23 November 2018 (hereinafter ‘Ezulwini Consensus’). See Chapter 15 for more information on the Ezulwini Consensus.

¹²³⁴ Republic of Namibia, *Namibia’s Policy on International Relations and Cooperation* (Republic of Namibia 2017) 28 and 53.

¹²³⁵ *ibid.*

¹²³⁶ *ibid.* 53.

¹²³⁷ Permanent Mission of the Republic of Namibia to the United Nations, ‘Namibia at the UN’ <<https://www.un.int/namibia/namibia/namibia-un>> accessed 23 November 2018.

¹²³⁸ See Article 25 of the Charter of the United Nations, 1945. See also D. Sarooshi, ‘Security Council’ Global Policy Forum <<https://www.globalpolicy.org/security-council/32932.html>> accessed 23 November 2018.

non-procedural matters.¹²³⁹ Decisions on procedural matters only require nine affirmative votes of the Security Council¹²⁴⁰ whereas decisions on all other matters require the ‘concurring’ or affirmative votes of *all* permanent members.¹²⁴¹

The veto power of permanent members has paralyzed the Security Council during the Cold War from 1945 to the early 1990s. It was only after the Cold War ended that the Security Council started to function as imagined in the UN Charter. The many peacekeeping missions the UN deployed in various parts of the world testify that states within the Security Council cooperate productively more often.

Cold War standoffs emerged because a permanent member may exercise its veto when one proposed resolution threatens its strategic or vital interests. And, it can be inferred from the historical use of the veto power that situations involving the compelling interests of any of the permanent members tend to paralyze the Security Council, but that does not mean that permanent members hold back or hijack the Council whenever a situation before the Council affect their interests.¹²⁴²

In principle, the AU opposes the veto power granted to permanent members.¹²⁴³ But if the UN gives selected African states the two permanent seats that it requests, then the AU considers it fair that the UN extends that veto power, however objectionable, to the African permanent members of the Security Council.¹²⁴⁴

After the Berlin Wall fell and the Cold War ended, permanent members of the Security Council managed to reach consensus in many situations affecting international peace and security. The risk of paralysis has been attenuated by the practice of permanent

¹²³⁹ See United Nations Security Council, ‘Voting System and Records’ <<http://www.un.org/en/sc/meetings/voting.shtml>> accessed 23 November 2018.

¹²⁴⁰ Article 27(2) of the Charter of the United Nations, 1945.

¹²⁴¹ Article 27(3) of the Charter of the United Nations, 1945.

¹²⁴² See A. Hashim, ‘Veto power at the UN Security Council,’ *Aljazeera* (5 February 2012) <<https://www.aljazeera.com/indepth/features/2012/02/201225152330761377.html>> accessed 14 October 2018. See also M.S. McDougal and R.N. Gardner, ‘The Veto and the Charter: An Interpretation for Survival’ (1951) 60 *Yale Law Journal* 258.

¹²⁴³ African Union, ‘Ezulwini Consensus’ *op cit*.

¹²⁴⁴ *ibid*.

members abstaining from voting. In the eyes and practice of the Council, an abstention from voting does not amount to a veto.¹²⁴⁵ However, the question as to whether an abstention corresponds to a 'concurring' vote remains unclear. Furthermore, the politicization of the Council has given rise to other developments. Among others, Council politics has prompted the General Assembly to assume its residual powers to maintain international peace and security.¹²⁴⁶ It also prompted the Secretary-General to take a more active role and hastened the deployment of peacekeeping operations.¹²⁴⁷

Both the General Assembly and the Secretary-General can bring the Council's attention to situations likely to endanger international peace and security.¹²⁴⁸ In addition to members of the UN, non-member states that accept peaceful settlement in terms of the UN Charter and the Secretary General may bring to the attention of the Security Council any situation that threatens international peace and security.¹²⁴⁹

a) Council action in situations that do not threaten international peace

Chapter VI of the UN Charter confers on the Security Council powers with regard to situations or disputes that are likely to threaten international peace. In such situations or disputes, the Security Council may recommend appropriate procedures or methods for resolving disputes.¹²⁵⁰ Just like the recommendations of the General Assembly, those Security Council recommendations do not bind member states.

The Charter lays down that, in situations contemplated by Chapter VI, the Security Council should bear in mind the fact that the ICJ handles those disputes best and that, accordingly, the Security

¹²⁴⁵ See Yuen-Li Liang, 'Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council' (1950) 44 *The American Journal of International Law* 694.

¹²⁴⁶ Shaw *op cit* 1087.

¹²⁴⁷ *ibid.*

¹²⁴⁸ Articles 11(3) and 99 of the Charter of the United Nations, 1945.

¹²⁴⁹ Articles 35(1)-(2) of the Charter of the United Nations, 1945. See also A.C. Kapur, *Principles of Political Science* (S. Chand 1997) 331.

¹²⁵⁰ Article 36 of the Charter of the United Nations, 1945.

Council should refer those disputes to that Court.¹²⁵¹ Dugard¹²⁵² observed that the Security Council seldom complies with that provision and prefers to handle and resolve those disputes politically. He believes that the refusal by the ICJ to accept compulsory jurisdiction on the basis of such referral in the *Corfu Channel* case¹²⁵³ may explain why the Security Council would rather solve those disputes diplomatically.

The UN has not yet definitively settled the question as to whether the Security Council could act in situations that do not threaten or breach regional or international peace. The intervention decided by the Security Council in Libya in 2011¹²⁵⁴ suggests that the Council can act in terms of Chapter VII even where a situation is purely internal and does not involve other states or threaten international peace.¹²⁵⁵

b) The Council in the face of threats to peace and security

When faced with a situation that threatens international peace, the Security Council can take decisions and resolutions in terms of Chapter VI, Chapter VII and Article 24 of the UN Charter. Chapter VI deals with situations that do *not* threaten international peace but that are likely to do so while Chapter VII deals with situations that threaten international peace.

Chapter VII of the Charter addresses situations that threaten international peace. In those situations, the Security Council can take decisions that are legally binding on member states. Article 25 of the Charter reads as follows:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

¹²⁵¹ Article 36(3) of the Charter of the United Nations, 1945.

¹²⁵² J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 481.

¹²⁵³ *United Kingdom v Albania*, [1949] I.C.J 4, 22. In that case, the U.K. claimed compensation for damage caused by mines to two U.K. warships crossing the Corfu Channel on 22 October 1946.

¹²⁵⁴ S.C. Res. 1973, U.N. Doc. S/RES/1973 (11 March 2011).

¹²⁵⁵ Dugard op cit 484.

Article 25 refers to ‘decisions’, which bind member states,¹²⁵⁶ as opposed to ‘recommendations’, which do not. The binding nature of the decisions by the Security Council under Chapter VII is pre-eminent. This pre-eminence means that the binding obligations of the member states under the UN Charter prevail over any other obligations under any other international treaty, convention or agreement.¹²⁵⁷ Examples of such decisions include economic sanctions and the authorizations to use force. The Security Council acted in terms of Chapter VII in many situations, for instance, Kuwait (1990-1991), Yugoslavia (1992-1993), Somalia (1992), Liberia (1992), Rwanda (1992), Côte d’Ivoire (2011) and Libya (2011). Before the Security Council can take an action in terms of Chapter VII, it must first “determine the existence” of a situation that constitutes a breach of international or regional peace and security.¹²⁵⁸ Such determination is often a political decision.

Propositions to act in terms of Chapter VII can be vetoed by any of the five permanent members. In the *Namibia Opinion* in 1971, the ICJ had to decide whether Resolution 276 – in which the Security Council declared South Africa’s continued presence ‘illegal’ – legally bound states by virtue of Article 25 of the Charter.¹²⁵⁹ The Security Council had not determined in terms of Article 39 that the situation constituted a breach to regional or international peace before it passed Resolution 276. The ICJ looked to the text and the historical background of Resolution 276 and reasoned that Article 25 (‘binding decisions of the Security Council’) does not only apply to Chapter

¹²⁵⁶ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, [1971] I.C.J. Reports 54 (the International Court of Justice held that “[t]hus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council.”)

¹²⁵⁷ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 339.

¹²⁵⁸ Article 39 of the Charter of the United Nations, 1945.

¹²⁵⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, [1971] I.C.J. Reports 16.

VII of the Charter.¹²⁶⁰ The Court concluded that the resolution was a binding decision in terms of Article 25 of the Charter.¹²⁶¹

Given that the Security Council did not make a determination as envisaged in Article 39, the ICJ most probably erred in law. Dugard also disagreed with that decision on the basis that states expect that Article 25 only pertains to decisions made under Chapter VII.¹²⁶²

In responding to a situation that threatens or breaches regional or international peace, the Security Council can take three types of legally binding measures, namely provisional measures, non-forcible measures, and forcible measures.¹²⁶³ The UN Charter empowers the Security Council to take provisional measures,¹²⁶⁴ such as ordering a ceasefire.¹²⁶⁵ The Charter also empowers the Council to take non-forcible measures. Non-forcible measures consist in the Security Council urging member states to take measures that do not involve the use of force.¹²⁶⁶ Those measures include interruption of economic relations and of communication, as well as the severance of diplomatic relations.¹²⁶⁷ It was under its power to take non-forcible measures that the Security Council resolved to create the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

Economic sanctions fall under the category of non-forcible measures. Economic sanctions have been used by the Security Council in the Iraq-Kuwait conflict (1990) and in Sudan (2004-2005). In particular, the Security Council imposed economic sanctions on the Democratic People's Republic Korea (DPRK, commonly known as 'North Korea'). The Council has sanctioned North Korea since 2006.¹²⁶⁸

¹²⁶⁰ *ibid* 53.

¹²⁶¹ *ibid* 54.

¹²⁶² Dugard *op cit* 489.

¹²⁶³ See L. Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12 Human Rights Law Review 1. See also A. Spain, 'The U.N. Security Council's Duty to Decide' (2013) 4 Harvard National Security Journal 320.

¹²⁶⁴ Article 40 of the Charter of the United Nations 1945.

¹²⁶⁵ S. Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body* (Springer 2014) 85-100.

¹²⁶⁶ Article 41 of the Charter of the United Nations, 1945.

¹²⁶⁷ Article 41 of the Charter of the United Nations, 1945.

¹²⁶⁸ S.C. Res. 1718, U.N. Doc. S/RES/1718 (14 October 2006) (imposing sanctions on the DPRK, such as a ban on the supply of heavy weaponry, missile

The UN Panel of Experts on North Korea singled out Namibia for violating UN sanctions in 2016 and 2017. A few North Korean construction companies under UN sanctions were conducting business in Namibia in 2016. One of them, Mansudae, built the new State House in the capital city and the Heroes Acre.¹²⁶⁹ In addition, it built the War Memorial and Independence Museum, a military base, and the new defence ministry headquarters.¹²⁷⁰ The Namibian government informed the UN that it had agreed to let those North Korean companies leave the country while highlighting Namibia's continued commitment to implementing "all UN sanctions" and to maintaining its "warm diplomatic relations" with North Korea.¹²⁷¹ In October 2017, Hugh Griffiths, the coordinator of the UN Panel of Experts on North Korea, accused Namibia of violating the UN sanctions against North Korea.¹²⁷² Namibia denied the accusations and maintained that it had terminated the contracts with the two North Korean contractors.¹²⁷³ Because sanctions imposed by the Security Council bind all member states, Namibia's dealings with North Korea until October 2017, at least, broke international law.

The first time the UN Security Council inflicted economic sanctions happened in the case of Southern Rhodesia (now

technology and materials). The UN Security Council imposed other sanctions in seven subsequent resolutions: S.C. Res. 1874, U.N. Doc. S/RES/1874 (12 June 2009)(strengthening sanctions against the DPRK); S.C. Res. 2094, U.N. Doc. S/RES/2094 (7 March 2013)(making the sanctions against the DPRK harsher); S.C. Res. 2270, U.N. Doc. S/RES/2270 (2 March 2016)(enhancing the sanctions against the DPRK, banning states from supplying aviation fuel to the DPRK); S.C. Res. 2321, U.N. Doc. S/RES/2321 (30 November 2016)(expanding the sanctions to include, among others, a ban on the export of minerals and the sale of helicopters); S.C. Res. 2371, U.N. Doc. S/RES/2371 (5 August 2017)(imposing a ban on iron and coal exports); S.C. Res. 2375, U.N. Doc. S/RES/2375 (11 September 2017)(strengthening sanctions against the DPRK); and S.C. Res. 2397, U.N. Doc. S/RES/2397 (22 December 2017)(imposing new restrictions on the exports of minerals and hydrocarbons, and on agriculture and labour exports).

¹²⁶⁹ N. Kahiurika, 'UN Twists Nam's Arm over North Korea' *The Namibian* (Windhoek, 1 September 2016) 1.

¹²⁷⁰ *ibid.*

¹²⁷¹ *ibid.*

¹²⁷² 'Namibia Dismisses U.N. Expert's Claims on North Korea Ties' *Reuters* (24 October 2017) <<https://www.reuters.com/article/us-namibia-north-korea/namibia-dismisses-u-n-experts-claims-on-north-korea-ties-idUSKBN1CT257>> accessed 23 November 2018.

¹²⁷³ *ibid.*

Zimbabwe).¹²⁷⁴ The Council adopted limited sanctions in 1965¹²⁷⁵ and 1966¹²⁷⁶ after the White-supremacist government of Ian Smith declared independence from the United Kingdom in 1968. Then, in 1968, the Security Council, in a unanimous vote, imposed mandatory sanctions against all imports from Rhodesia.¹²⁷⁷ The Council unanimously adopted those sanctions on the basis of Article 41 under Chapter VII.

c) The Council's use of forcible measures

Where the Security Council determines that non-forcible measures would not suffice to maintain or restore international peace and security, the Security Council can take forcible measures.¹²⁷⁸ Under this heading, the Security Council can authorize a member state or member states to use force:¹²⁷⁹

Should the Security Council consider that measures provided for in Article 41 [i.e., non-forcible measures] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Thus, in 1990, the Security Council authorized member states to use force against Iraq after it invaded Kuwait.¹²⁸⁰ And, in 2011, the

¹²⁷⁴ R. Hasse, 'Why Economic Sanctions Always Fail – The Case of Rhodesia,' (1978) 13 *Intereconomics* 194.

¹²⁷⁵ S.C. Res. 216, U.N. Doc. S/RES/216 (12 November 1965). This resolution also condemned the "unilateral declaration of independence made by a racist minority in Southern Rhodesia". It is complemented by another resolution: S.C. Res 217, U.N. Doc. S/RES/217 (20 November 1965).

¹²⁷⁶ S.C. Res. 232, U.N. Doc. S/RES/232 (16 December 1966).

¹²⁷⁷ S.C. Res. 253, U.N. Doc. S/RES/253 (29 May 1968) paragraph 3.

¹²⁷⁸ M. Lourdes and S. Galván, 'Interpretation of Article 39 of the UN Charter (Threat to Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?' (2011) 11 *Anuario Mexicano de Derecho Internacional* 147.

¹²⁷⁹ Article 42 of the Charter of the United Nations, 1945.

¹²⁸⁰ S.C. Res. 678, U.N. Doc. S/RES/678 (29 November 1990) (authorizing UN member states to "use all necessary means to uphold [all the relevant resolutions] and to restore international peace and security" in the Iraq-Kuwait area).

Council authorized a no-fly zone over the armed forces of the Libyan regime headed by Gaddafi.¹²⁸¹

d) Peacekeeping missions

When the UN was set up in 1945, the drafters of the Charter initially envisaged a UN force in terms of Article 43 of the Charter. Instead, the UN deployed specific peacekeeping missions to specific hotspots.

The UN Charter does not expressly provide for peacekeeping operations. The UN mounts those operations either in terms of Chapter VI or Article 24 of the Charter, which deals with general powers of the Security Council. In the *Expenses* case,¹²⁸² the ICJ held that peacekeeping forces do not constitute an enforcement action as long as they have the consent of the host state. If the UN directs its action against a non-consenting state, then the action would amount to an enforcement action and require conformity with Chapter VII of the Charter.

Ad hoc agreements between the UN and the states contributing troops to the operations provide for peacekeeping operations.¹²⁸³ The UN also enters into agreements with the state where it will station its operations. The host state grants immunities and privileges to the UN peacekeeping operations.

Both the Security Council and the General Assembly have been involved in establishing peacekeeping forces in many hot spots. The Security Council and the General Assembly have established peacekeeping missions in Somalia (UNISOM) in 1992,¹²⁸⁴ in Rwanda (UNAMIR) in 1993,¹²⁸⁵ in South Africa (UNOMSA) in 1994,¹²⁸⁶ in Sierra Leone (UNAMSIL) in 1999,¹²⁸⁷ in Kosovo (UNMIK) in

¹²⁸¹ S.C. Res. 1973, U.N. Doc. S/RES/1973 (11 March 2011).

¹²⁸² *Certain Expenses of the United Nations Case* [1962] I.C.J. Reports 151.

¹²⁸³ A. Novosseloff, 'Can We Make Un Peacekeeping Great Again?' (2017) *Global Review Peace Operations* <<https://peaceoperationsreview.org/thematic-essays/can-we-make-un-peacekeeping-great-again/>> accessed 23 November 2018.

¹²⁸⁴ S.C. Res. 751, U.N. Doc. S/RES/751 (24 April 1992).

¹²⁸⁵ S.C. Res. 872, U.N. Doc. S/RES/872 (5 October 1993).

¹²⁸⁶ S.C. Res. 772, U.N. Doc. S/RES/772 (17 August 1992) and S.C. Res. 894, U.N. Doc. S/RES/894 (14 January 1994).

¹²⁸⁷ S.C. Res. 1270, U.N. Doc. S/RES/1270 (22 October 1999).

1999,¹²⁸⁸ in the Democratic Republic of the Congo (MONUC, later renamed MONUSCO) in 1999,¹²⁸⁹ and in Darfur (UNAMID) in 2007.¹²⁹⁰

In 1989, the UN set up the United Nations Transition Assistance Group (UNTAG) to supervise elections that led to Namibia's independence in 1990.¹²⁹¹

Lately, the UN appears to have largely blended the distinction between peacekeeping force and enforcement action. The Security Council authorized peacekeepers to use force against rebels in the Democratic Republic of the Congo (DRC) in 2013.¹²⁹² That mandate notably marked the first time the UN granted a peacekeeping force an offensive mandate and the first time the UN deployed drones in a conflict situation.¹²⁹³ Another good example of this blurring of peacekeeping and enforcement is UNPROFOR in Bosnia-Herzegovina from 1992 to 1995.¹²⁹⁴ This evolution seems to translate the need for greater effectiveness in ensuring international peace and security.

Last but not least, the active engagement of UN peacekeeping forces in violent armed conflicts has affected the personal safety of peacekeepers.¹²⁹⁵ In 1995, the UN passed the Convention on the Safety of United Nations and Associated Personnel.¹²⁹⁶ This Convention imposes a duty on states to criminalize any attack against UN personnel.¹²⁹⁷

¹²⁸⁸ S.C. Res. 1244, U.N. Doc. S/RES/1244 (10 June 1999).

¹²⁸⁹ S.C. Res. 1279, U.N. Doc. S/RES/1279 (30 November 1999).

¹²⁹⁰ S.C. Res. 1769, U.N. Doc. S/RES/1769 (31 July 2007).

¹²⁹¹ S.C. Res. 632, U.N. Doc. S/RES/632 (16 February 1989).

¹²⁹² S.C. Res. 2098, U.N. Doc. S/RES/2098 (28 March 2013).

¹²⁹³ United Nations Security Council, "Intervention Brigade" Authorized as Security Council Grants Mandate Renewal for United Nations Mission in Democratic Republic of Congo' <<https://www.un.org/press/en/2013/sc10964.doc.htm>> accessed 23 November 2018.

¹²⁹⁴ S.C. Res. 795, U.N. Doc. S/RES/795 (11 December 1992).

¹²⁹⁵ United Nations, 'Delegates Express Concern over Safety of Peacekeepers, Civilians amid Rising Targeted Attacks, as Special Committee Concludes General Debate' <<https://www.un.org/press/en/2016/gapk225.doc.htm>> accessed 23 November 2018.

¹²⁹⁶ Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 U.N.T.S. 363 (entered into force 15 January 1999).

¹²⁹⁷ Article 7 of the Convention on the Safety of United Nations and Associated Personnel, 1994.

1.2 The Secretary-General

After the Security Council recommends a candidate, the General Assembly appoints him or her as UN Secretary-General.¹²⁹⁸ The Secretary-General can be seen as the chief executive of the UN.¹²⁹⁹ He or she manages the UN Secretariat. Among other functions, the Secretary General points out to the Security Council any situation that he or she thinks threatens or breaches international peace and security.¹³⁰⁰

The Security Council entrusts the Secretary-General with the task to act as a mediator in disputes. In this role as mediator and promoter of international peace, the Secretary-General can be active or passive, depending on his personality. This observation can be illustrated with the tenure of two Secretary-Generals from Africa with strikingly different profiles. The Egyptian Boutros Boutros-Ghali (1992-1997) assumed an active and outspoken attitude. Because of his clashes with the US, the UN did not renew his term as Secretary-General.¹³⁰¹ On the other hand, the Ghanaian Kofi Annan (1997-2006) kept a low profile and behaved more diplomatically than his Egyptian predecessor. Mr. Annan's diplomacy lasted two terms and bore fruits in several respects, for instance, when the UN created the Human Rights Council and when it adopted the Millennium Development Goals and the contested 'responsibility to protect' (R2P) principle.

Virtually all Secretary-Generals fit one of those two profiles, or some place in between. The current Secretary-General, Antonio Guterres, a former Prime Minister of Portugal, took office on January 1st, 2017. It is too soon to assess or brand his leadership style.

¹²⁹⁸ Article 97 of the Charter of the United Nations, 1945.

¹²⁹⁹ Article 97 of the Charter of the United Nations, 1945 (describing the Secretary-General as "the chief administrative officer"). For Antonio Guterres's profile, see United Nations Secretary-General, 'Biography' <<https://www.un.org/sg/en/content/sg/biography>> accessed 23 November 2018.

¹³⁰⁰ Article 99 of the Charter of the United Nations, 1945.

¹³⁰¹ J.M. Goshko, 'Boutros Boutros-Ghali, U.N. Secretary-General Who Clashed With the U.S., Dies,' *Washington Post* (16 February 2016) <https://www.washingtonpost.com/world/boutros-boutros-ghali-un-secretary-general-who-clashed-with-us-dies-at-93/2016/02/16/8b727bb8-d4c1-11e5-be55-2cc3c1e4b76b_story.html?noredirect=on&utm_term=.780a6e1d89f2> accessed 23 November 2018.

1.3 The General Assembly

While the Security Council has the primary responsibility for maintaining international peace, the General Assembly's responsibility is, by comparison, secondary. The General Assembly is a plenary institution as it comprises all member states of the UN.¹³⁰² It meets every year in ordinary sessions in September.¹³⁰³ To be precise, these ordinary sessions usually take place on a Tuesday, on the third week of September. Namibia prides itself for having presided the 54th session of the General Assembly, which adopted the Millennium Development Goals (MDGs),¹³⁰⁴ which preceded and informed the current Sustainable Development Goals (SDGs).

The UN Charter empowers the General Assembly to discuss and adopt resolutions on any matters that pertain to the maintenance of international peace¹³⁰⁵ or any matters falling under the purview of the UN Charter.¹³⁰⁶ Any member state, non-member states, or the Security Council can put forward proposals for discussion. The General Assembly may make recommendations to resolve disputes or situations likely to "impair the general welfare or friendly relations among nations".¹³⁰⁷

Each state has one vote in the General Assembly.¹³⁰⁸ The General Assembly generally decides questions by a simple majority,¹³⁰⁹ but it makes 'decisions on important questions' by a two-thirds majority of the members present and voting.¹³¹⁰ An 'important decision' refers to a decision, including a recommendation, on matters concerning the maintenance of international peace; the admission, suspension, and expulsion of members; and budgetary matters.¹³¹¹ Similarly, the

¹³⁰² Article 9(1) of the Charter of the United Nations, 1945 (providing that "[t]he General Assembly shall consist of all the Members of the United Nations.").

¹³⁰³ Article 20 of the Charter of the United Nations, 1945.

¹³⁰⁴ Republic of Namibia *op cit* 53.

¹³⁰⁵ Article 11(2) of the Charter of the United Nations, 1945.

¹³⁰⁶ Article 10 of the Charter of the United Nations, 1945.

¹³⁰⁷ Article 14 of the Charter of the United Nations, 1945.

¹³⁰⁸ Article 18(1) of the Charter of the United Nations, 1945.

¹³⁰⁹ Article 18(3) of the Charter of the United Nations, 1945.

¹³¹⁰ See Article 18(2) of the Charter of the United Nations, 1945.

¹³¹¹ Article 18(2) of the Charter of the United Nations, 1945. See also M.D. Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 *European Journal of International Law* 879.

General Assembly adopts resolutions mostly by a two-thirds majority vote. Although the resolutions of the General Assembly are generally not legally binding, resolutions regarding its internal management are.¹³¹²

The General Assembly can address a wide range of matters. At times, it can defer matters to the Security Council,¹³¹³ which carries the primary responsibility for maintaining international peace.¹³¹⁴ When the Security Council is seized of a situation that threatens or breaches international peace, the General Assembly may not pass a resolution on that matter.¹³¹⁵

2. The UN's role in Namibia's nationhood

The UN, especially the General Assembly and the Security Council, played an indispensable role in Namibia's struggle for independence and statehood. The UN enabled Namibia to satisfy the legal and political conditions for both. In particular, between 1968 and 1990, the Security Council passed about 20 resolutions on the situation in Namibia (see Annex 2). Its last resolution in 1990 recommended Namibia to the General Assembly for admission to the UN as a full member.

2.1 UN membership and its effect on the UN's stance towards Namibia

The position of the UN on the Namibia question evolved from the 1940s to the late 1980s. This evolution reflected the changing composition of the General Assembly and, to a lesser extent, the Security Council. As the General Assembly admitted more members and became more representative of the international community, the UN stance on the Namibia question increasingly favoured the cause of the Namibian people.

¹³¹² Öberg op cit 879.

¹³¹³ Article 11(2) of the Charter of the United Nations, 1945.

¹³¹⁴ Article 24(1) of the Charter of the United Nations, 1945.

¹³¹⁵ C. Kenny, 'Responsibility to Recommend: The Role of the UN General Assembly in the Maintenance of International Peace and Security' (2016) 3 Journal on the Use of Force and International Law 3.

When it came into existence in 1945, the UN only had 51 members.¹³¹⁶ From Africa, only Egypt, Ethiopia, Liberia, and the Union of South Africa sat in the Assembly.¹³¹⁷ That accounted for less than 10% of the General Assembly's entire membership.

2.2 Namibia's commitment to the UN

Today, Namibia has committed to paying its financial obligations and to playing its role in managing UN agencies to ensure the financial viability and survival of the global organization.¹³¹⁸ It also contributes to the UN's peacekeeping efforts.¹³¹⁹

3. The use of force by states

The rules regulating the use of force, together with those on the independence of states and territorial sovereignty, form part of the central principles of international law.¹³²⁰ In the *Nicaragua* case,¹³²¹ the ICJ said that the prohibition on the use of force by states is a rule of customary international law. While in municipal law states generally enjoy monopoly on the use of force, in international law no such monopoly exists; and the international community's capacity to enforce its rules, including those on the use of force, is limited.¹³²² Instead, reliance is placed on state consent, reciprocity and good faith.¹³²³

Before nations adopted the General Treaty for the Renunciation of War in 1928,¹³²⁴ international law did not forbid states from using force.¹³²⁵ The League of Nations did not enact the General Treaty for

¹³¹⁶ United Nations, 'Growth in the United Nations Membership, 1945-Present' <<http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>> accessed 27 November 2018.

¹³¹⁷ See *ibid.*

¹³¹⁸ Republic of Namibia *op cit* 53.

¹³¹⁹ *ibid* 58.

¹³²⁰ Shaw *op cit* 1013.

¹³²¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States), Merits, Judgment* [1986] I.C.J. Reports 99.

¹³²² Shaw *op cit* 1013.

¹³²³ *ibid.*

¹³²⁴ General Treaty for the Renunciation of War 1928, U.K.T.S. 29 (1929), Cmnd. 3410; 94 L.N.T.S. 57.

¹³²⁵ D. Olowu, *International Law: A Textbook for the South Pacific* (Lulu 2010) 140.

the Renunciation of War, also known as the Briand-Kellogg Pact or the Pact of Paris: Rather, states devised and adhered to that treaty outside the institutional framework provided by the League of Nations. Sixty nations adopted the Pact. This Pact makes it illegal for states to use force or threaten to do so. It forbids states from using force in international relations and urges them to resolve their disputes by peaceful means. Specifically, the Briand-Kellogg Pact outlaws both declared and undeclared wars.¹³²⁶ However, the Pact does not prohibit the use of force in the context of an internal revolution, a rebellion, etc.

In summary, international law prohibits the unilateral use of force but allows, in special circumstances, the collective use of force. Thus, today, the general prohibition on the use of force is found in Article 2(4) of the UN Charter, which obliges member states to refrain from the threat or use of force against any state:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The broad phrase “use of force” – as opposed to ‘war’ – translates a clear intention to include any armed conflict generally, and not simply formal war between states.¹³²⁷

Some scholars have, however, countered that the phrase “against the territorial integrity or political independence of any state” limits the scope of the general prohibition of Article 2(4) of the UN Charter to cases where the territorial integrity and political independence of states are violated.¹³²⁸ Thus, in 2005, the Eritrea-Ethiopia Claims Commission rejected Eritrea’s argument that it could seize the

¹³²⁶ See C. Tsuzuki, *The Pursuit of Power in Modern Japan 1825-1995* (Oxford University Press 2000) 341. See also D.B. Stevens, ‘Time of War and Vietnam’ (2014) 8 *The United States Air Force JAG Law Review* 25.

¹³²⁷ T. Buergenthal and S.D. Murphy, *Public International Law in a Nutshell* (5th edn, West 2002) 334.

¹³²⁸ *ibid.*

disputed territory by military force.¹³²⁹ Similarly, that same year, the ICJ ruled that Uganda violated Article 2(4) of the UN Charter by engaging in military action in eastern DRC between August 1998 and July 1999.¹³³⁰

I must emphasize a few things. First, Article 2(4) of the UN Charter does not only apply to direct use of force; it also applies to *threats* of force.¹³³¹ Moreover, Article 2(4) must be read together with other provisions of the UN Charter, such as Article 51, which recognizes the right to collective self-defence. In addition, the general prohibition on the use of force in Article 2(4) does not prevent states from using force in order to maintain peace and order within their borders, for instance, in cases of riots and insurrections.¹³³²

Article 2(4) of the UN Charter is regarded as a principle of customary international law.¹³³³ Dugard says that the prohibition on the use of force has the status of *jus cogens*.¹³³⁴ Several international legal instruments embody the principle contained in Article 2(4). The 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States defines the principle at several points.¹³³⁵ First, wars of aggression constitute a crime against peace and entail state responsibility. Also note that the Rome Statute establishing the International Criminal Court now makes the aggression of one state by another an international crime, one that falls under the Court's jurisdiction.¹³³⁶ Second, states must not use force to deprive peoples of their right to self-determination or use it as reprisal(s). Furthermore, states must not threaten to use force in order to settle disputes or violate another state's territorial

¹³²⁹ *Eritrea-Ethiopia Claims Commission – Partial Award: Jus Ad Bellum – Ethiopia's Claims 1-8*, [2005] XXVI Reports of International Arbitral Awards 457 [16].

¹³³⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Reports 168.

¹³³¹ Shaw op cit 1020.

¹³³² *ibid* 1020.

¹³³³ *ibid* 1018.

¹³³⁴ Dugard op cit 496.

¹³³⁵ The Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), (24 October 1970).

¹³³⁶ Article 5(1) (d) of the Rome Statute Establishing the International Criminal Court, 1998, U.N. Doc. A/CONF. 183/9; 37 I.L.M. 1002 (1998); 2187 U.N.T.S. 90.

integrity. Last but not least, states must not engage in civil strife or terrorist acts.¹³³⁷

In practice, states sometimes violate the prohibition on the use of force by states. When these violations occur, states resorting to force either try to justify it by one of the exceptions to this rule of customary international law or use force in a hidden or indirect manner.¹³³⁸

3.1 What is ‘force’?

The general view is that the meaning of force, for the purposes of the prohibition on the use of force by states, only applies to ‘armed’ force.¹³³⁹ This view also appears from the history that led to Article 2(4) of the UN Charter. (By way of reminder, the two world wars inspired Article 2(4).) With such an interpretation, the use of economic force¹³⁴⁰ would fall outside the purview of the prohibition.

Countries in the developing world do not share that interpretation. They argue that economic force exerts an influence as powerful as armed conflict in resolving international disputes.¹³⁴¹ In addition, rich states sometimes use economic force to coerce the behaviour of weaker states. Tandon,¹³⁴² for example, says that trade – including trade sanctions – is war waged by the West against the weaker states of the global South. And in *Nicaragua*, counsel for the Latin American state complained before the ICJ that the US had withdrawn its own aid to Nicaragua, drastically reduced the quota for

¹³³⁷ A.M. Hingorani, *Unravelling the Kashmir Knot* (Sage 2016) 318. It is well settled that states must not engage in or support terrorism or subversive activities.

¹³³⁸ C.J. Tams, ‘The Use of Force against Terrorists’ (2009) 20 *The European Journal of International Law* 359.

¹³³⁹ E. Wilmshurst, ‘Principles of International Law on the Use of Force by States in Self-Defence’ (2005) <<https://www.chathamhouse.org/publications/papers/view/108106>> accessed 24 November 2018.

¹³⁴⁰ K.R. DeRouen, ‘The Indirect Link: Politics, the Economy, and the Use of Force’ (1995) 39 *The Journal of Conflict Resolution* 671.

¹³⁴¹ E. Conteh-Morgan, ‘International Intervention: Conflict, Economic Dislocation, and Hegemonic Role of Dominant Actors’ (2001) 6 *The International Journal of Peace Studies* <http://www.gmu.edu/programs/icar/ijps/vol6_2/Conteh-Morgan.htm> accessed 24 November 2018.

¹³⁴² See Y. Tandon, *Trade Is War: The West’s War against the World* (OR Books 2015).

imports of sugar from Nicaragua to the US, imposed a trade embargo, and used its influence in the Inter-American Development Bank and the World Bank to block lending to Nicaragua.¹³⁴³

The argument of developing countries finds support in the 1970 Declaration on Principles of International Law, which prohibits the use of economic force against another state to obtain from it the subjugation of its sovereign rights.¹³⁴⁴ However, states have generally not yet accepted this argument as a rule of international law. In the *Nicaragua* case, the ICJ found that economic sanctions imposed by the US on Nicaragua fell outside its jurisdiction¹³⁴⁵ and did not constitute a breach of international law.¹³⁴⁶

Another question relates to indirect force. Admittedly, Sudan supported rebels in Chad. Though Sudan had not officially declared war against Chad, did Sudan's actions fall under the prohibition on the use of force? The ICJ in the *Nicaragua* case and the 1970 Declaration on the Principles of International Law answer this question in the affirmative. However, the Court in the *Nicaragua* case did not answer the question as to whether the prohibition on the use of force extended to a state supporting a national liberation movement in the context of decolonization. The *Nicaragua* case, decided in 1986, did not outlaw state support to liberation movements such as SWAPO before 1990. These movements are treated as engaged in international wars such that the laws of war apply to these movements. The latest wave of decolonization in Africa left very few national liberation movements. The Polisario in Western Sahara counts among the very few remaining national liberation movements in the world.¹³⁴⁷

States use different categories of force. These include retorsion, reprisals, and self-defence. Retorsion occurs when one state performs

¹³⁴³ *Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, Judgment, [1986] I.C.J. Reports 22.

¹³⁴⁴ Shaw op cit 1019.

¹³⁴⁵ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, Judgment, [1986] I.C.J. Reports 126.

¹³⁴⁶ *ibid.* The Court ruled that it is "unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention."

¹³⁴⁷ M.J. Stephan and J. Mundy, 'A Battlefield Transformed: From Guerrilla Resistance to Mass Nonviolent Struggle in the Western Sahara' (2006) 8 *Journal of Military and Strategic Studies* 1.

an unfriendly and harmful act, which is nonetheless lawful, as a way of retaliating against the harmful activities of another state.¹³⁴⁸ The major – if not the only – difference between retorsion and reprisals is that international law make reprisals illegal in themselves.

3.2 Exceptions

The general prohibition on the use of force by states admits two exceptions, namely where such force is authorized by the Security Council acting under Chapter VII of the UN Charter and where a state or a group of states acts in self-defence.

a) Security Council authorizations

The Security Council can authorize the use of force by states when it acts in terms of Chapter VII of the UN Charter. Article 2(4) of the Charter does not apply to the Security Council when it acts in terms of Chapter VII of the Charter. By virtue of Chapter VII of the Charter, the Security Council can authorize UN forces or individual states to intervene in a country on humanitarian grounds. The intervention in Kosovo in the early 1990s offers a good example of humanitarian intervention.

Humanitarian interventions have been criticized as being contrary to the general prohibition on the use of force, as provided for in Article 2(4) of the UN Charter.¹³⁴⁹ But since the UN intervened in Kosovo, several countries have called for humanitarian interventions. Article 4(h) of the Constitutive Act of the African Union authorizes humanitarian interventions in grave circumstances, namely war crimes, crimes against humanity and genocide. Although the continent has been the theatre of several humanitarian tragedies, so far the AU has hardly invoked Article 4(h). In addition, in 2005, the UN General Assembly passed a resolution that recognized the

¹³⁴⁸ Shaw op cit 1022.

¹³⁴⁹ See M. Wood, 'International Law and the Use of Force: What Happens in Practice?' (2013) 53 *Indian Journal of International Law* 345. See also M. Stanulova, 'Has Humanitarian Intervention Become an Exception to the Prohibition on the Use of Force in Article 2(4) of the UN Charter?' <http://archive.atlantic-community.org/app/webroot/files/articlepdf/Stnulova_Humanitarian%20Intervention.pdf> accessed 24 November 2018.

responsibility to protect.¹³⁵⁰ The UN Security Council invoked the responsibility to protect in the resolution that it voted to authorize interventions in Libya.¹³⁵¹

Although international law generally forbids intervention of one state into another state facing civil strife,¹³⁵² it allows such non-humanitarian interventions under certain circumstances.¹³⁵³ A state may not intervene in another state where the government invited it to chip in when armed conflict which has erupted aims at replacing that government.¹³⁵⁴ Such interventions would contravene the right to self-determination. Authorization from a regional body such as SADC will not make such interventions lawful as regional bodies cannot authorize the use of force without express authorization from the Security Council.¹³⁵⁵ This line of reasoning would prohibit any assistance brought to Muammar Gaddafi when, in 2011, he was facing an armed revolt that wished to topple him. By contrast, a state may intervene in another state where the government invited it to intervene to bring back law and order, not related to attempts to replace that government.

However, a state can intervene in another state facing a rebellion aimed at replacing its government if such rebellion is actively supported by a third state.¹³⁵⁶ This scenario played out in the Second DRC War from 1998 to 2003. In such a situation, the intervening state acts in collective self-defence against foreign aggression. Namibia intervened in the DRC and lent logistical support to the

¹³⁵⁰ G.A. Res. 60/1, U.N. G.A.O.R., 60th Sess., U.N. Doc. A/60/L.1 (24 October 2005).

¹³⁵¹ S.C. Res. 1973, U.N. Doc. S/RES/1973 (11 March 2011) (In the preamble of that resolution, the Security Council ‘reiterated’ “the responsibility of the Libyan authorities to protect the Libyan population”).

¹³⁵² See The Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 1970.

¹³⁵³ P. Beaumont, ‘Yes, the UN Has a Duty to Intervene. But When, Where and How?’ *The Guardian* (4 May 2013) <<https://www.theguardian.com/world/2013/may/04/un-syria-duty-to-intervene>> accessed 24 November 2018.

¹³⁵⁴ See E. Lieblich, ‘Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements’ (2011) 29 *Boston University International Law Journal* 337.

¹³⁵⁵ *ibid.*

¹³⁵⁶ Wilmshurst *op cit.*

incumbent government, which faced a rebellion that intended to topple it. For that reason, Namibia's support to the DRC government fell in the category of interventions in circumstances where a third state destabilizes the state inviting interventions by other states. But was that intervention ordered in line with the Namibian Constitution? In all likelihood, the intervention contravened the Constitution as the Namibian President did not declare war, nor did he consult with the Parliament before contributing troops to the conflict in the DRC.¹³⁵⁷

b) Self-defence

The *Caroline* case in 1837 provided the classical definition of self-defence in customary international law.¹³⁵⁸ In that case, the US argued that, for a claim of self-defence to succeed, a claimant must prove that it was necessary and that it had no other alternative.

Article 51 of the UN Charter contains the contemporary formulation of self-defence:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

International law has always allowed the use of force in self-defence.¹³⁵⁹ It is therefore more accurate to say that Article 51 of the UN Charter does not create the inherent right of self-defence but it only preserves what already existed since times immemorial.¹³⁶⁰ Recent state practice indicates that an armed attack does not have to

¹³⁵⁷ See Article 26 of the Namibian Constitution, 1990 (providing for declarations of states of national defence and for declarations of martial law).

¹³⁵⁸ 29 BFSP 1137 and 30 BFSP 195.

¹³⁵⁹ Buergenthal and Murphy op cit 336.

¹³⁶⁰ *ibid.*

come from a foreign state before the injured state can engage in self-defence.¹³⁶¹ For example, even though the Afghan government had not actively participated in the terrorist attacks of 11 September 2001, the US could nonetheless engage in self-defence against terrorists hiding on Afghan territory.

A state must prove that it has suffered an armed attack before it can validly justify its use of force in self-defence.¹³⁶² International custom also requires that self-defence be necessary and proportionate to the armed attack.¹³⁶³

What exactly amounts to an 'armed attack' is a deceptively simple requirement. In the *Nicaragua* case, the ICJ said that not every unlawful use of force amounts to an armed attack. States have tried to expand the meaning of Article 51 of the Charter when they tried to justify their actions against other states. They have deployed several arguments in their endeavour to widen the scope of Article 51.

States have used self-defence to justify actions to anticipate an imminent attack.¹³⁶⁴ Anticipatory or pre-emptive self-defence is not accepted under international law.¹³⁶⁵ The US used the argument of anticipatory self-defence in 2002 to justify its intervention in Iraq in 2003 in the context of the global war against terror. In the wake of the terrorist attacks in the US on 11 September 2001, the Security Council adopted two resolutions (Resolutions 1368¹³⁶⁶ and 1373¹³⁶⁷) that re-affirmed the right to self-defence in the context of terrorism. The US and the UK used the right to self-defence to justify the countless bombs it dropped in Afghanistan in 2001 for allowing the Taliban to operate from its territory to launch attacks against the US.

¹³⁶¹ *ibid* 337.

¹³⁶² M.F. Brennan, 'Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law' (1999) 59 *Louisiana Law Review* 1195.

¹³⁶³ Buergethal and Murphy *op cit* 340.

¹³⁶⁴ G. Brandis, 'The Right of Self-Defence against Imminent Armed Attack in International Law' (2017) EJIL: Talk! <<https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/>> accessed 24 November 2018.

¹³⁶⁵ L. Van den Hole, 'Anticipatory Self-Defence under International Law' (2003) 19 *American University International Law Review* 69.

¹³⁶⁶ S.C. Res. 1368, U.N. Doc. S/RES/1368 (12 September 2001).

¹³⁶⁷ S.C. Res. 1373, U.N. Doc. S/RES/1373 (28 September 2001).

Very few jurists have accepted that argument by the US. The best course of action for the US would have been to ask the Security Council for express authorization to use force, as it did before it intervened in Iraq in the early 1990s.

The ICJ has espoused a strict construction of Article 51. In the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,¹³⁶⁸ the Court held that anticipatory self-defence could not justify the construction of a wall in the occupied Palestinian territory.

International lawyers have not yet settled the question as to whether a state can act in anticipatory self-defence if it has suffered a series of raids from another country. The UN never accepted those versions of the anticipatory self-defence argument.¹³⁶⁹

Some states have resorted to force to protect their nationals abroad. Whether states may claim the right to use force in such a manner is a hotly debated issue. Plus, the status of this 'right' as part of customary international law remains contested.¹³⁷⁰ Israel used force to protect its nationals that some Palestinian terrorists held captive in Entebbe, Uganda. (In that intervention, Israeli Prime Minister Benyamin Netanyahu, who participated in the commando along with his brother, lost his brother.¹³⁷¹) This rescue mission, Operation Thunderbolt, most probably violated Uganda's territorial sovereignty given that it took place without Uganda's permission. Benin, Libya, and Tanzania even prepared a draft resolution that would have qualified the operation as a blatant violation of Uganda's territorial integrity, but they did not insist on a vote.¹³⁷² In fact, most

¹³⁶⁸ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion* [2004] I.C.J. Reports 136.

¹³⁶⁹ Dugard op cit 504.

¹³⁷⁰ See D.J. Gordon, 'Use of Force for the Protection of Nationals Abroad: The Entebbe Incident,' (1977) 9 Case Western Reserve Journal of International Law 117.

¹³⁷¹ D. Macintyre, 'Binyamin Netanyahu Visits Scene of Brother's 1976 Entebbe Airport Death' *The Guardian* (4 July 2016) <<https://www.theguardian.com/world/2016/jul/04/binyamin-netanyahu-israel-entebbe-airport-uganda>> accessed 24 November 2018.

¹³⁷² C. Kress and B.K. Nussberger, 'Part 1 The Cold War Era (1945-1989), 19 The Entebbe Raid – 1976' in T. Ruys, O. Corten, and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018) 224-225.

Security Council members agreed that the operation affected all states, but at the end of the day the Security Council did not adopt any resolution.¹³⁷³

Why Benin, Libya and Tanzania backpedalled is not entirely clear. But the skewed power relations among members of the Security Council could explain why the three African nations backed down. Moreover, the huge outpouring of sympathy by many governments in the world for the Jewish people could also explain those nations' change of heart. They may have calculated that insisting on a vote to condemn Israel's actions in Uganda would not serve their interests.

In conclusion, whether in the form of self-defence or of actions to prevent breaches to international peace and security, the UN is not the only institution that specifies the circumstances where states can legally use force. The African Union represents a mechanism that performs functions similar to those of the UN in terms of peace and security. The peace-and-security role that the UN plays on the global stage, the African Union plays it at the African continental level, as I show you in the next chapter.

¹³⁷³ See Kress and Nussberger op cit 225.

AFRICAN UNION

The United Nations does not hold a monopoly in resolving situations that threaten international peace and security. The African Union shares that responsibility, albeit at a regional scale. The African Union (AU) offers a regional institutional framework where African states conduct a great deal of activities on an international plane and bring local solutions to local problems. The AU, formerly the Organization of African Unity (OAU), played a first-rate part in the decolonization of African nations. It continues its battle for the economic and (greater) political independence of the continent.

Namibia is probably the only country on the continent where, at official events, people sing the AU anthem after the national anthem. Gawanas would see in this practice the most profound respect and a longstanding commitment to the AU;¹³⁷⁴ Diescho views in this practice a country more pro-African than Angola and South Africa, but a country that lacks consistency and intellectual cohesion.¹³⁷⁵ Despite its obvious flaws, such as its financial dependence on Western donors for its budgetary needs, the AU (and the OAU) has provided a platform for the continent's voices to be heard and taken seriously on the global scene.

At this point of the journey, I present the AU and some of the challenges it grapples with. In doing so, I also highlight episodes that feature and relate to Namibia.

¹³⁷⁴ See B. Gawanas, 'Namibia and the African Union' in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia's Foreign Relations: Historic Contexts, Current Dimensions and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 253.

¹³⁷⁵ J. Diescho, 'Namibia's Attitudes Towards Pan-Africanism' in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia's Foreign Relations: Historic Contexts, Current Dimensions and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 423.

1. Pan-Africanist and institutional origins

1.1 Pan-Africanism

Pan-Africanism brought into existence the Organization of African Unity (OAU), the AU's ancestor. This philosophy or belief system proposes that peoples of African descent share common interests and should therefore unite.¹³⁷⁶ Different versions of pan-Africanism co-exist. At its most basic, that philosophy envisions a united Africa where all the people of Africa and the African diaspora can live.¹³⁷⁷

Peoples of African descent living in the United States (US) first spread Pan-Africanist ideas in the mid-19th century. Both African Americans (for example, Martin Delany) and Blacks from the West Indies (for example, Edward Blyden) led this movement in the US. These early Pan-Africanists underlined the common experiences of peoples in Africa and Blacks in the US.¹³⁷⁸

Despite the contributions of Pan-Africanists such as Delany and Blyden, most scholars regard W.E.B. Du Bois as the actual father of modern Pan-Africanism. Du Bois' followers include the Jamaican-born Marcus Garvey and George Padmore from Trinidad. Those activists influenced Léopold Sedar Senghor, Nkwame Nkrumah, Haile Selassie, and Jomo Kenyatta, from Senegal, Ghana, Ethiopia, and Kenya, respectively.

By the mid-1940s, the Pan-Africanism had moved from the US to Africa. And, in the 1960s, following the first wave of independence in Africa, Pan-Africanism became confined to the priorities of the African continent. In 1963, it led to the creation of the OAU.

Ironically, though African Americans and West Indians originated the Pan-Africanist movement, neither the OAU nor the AU has included in its membership African Americans or any West Indian nation such as Jamaica, Haiti or Trinidad. Like historian Boukari-Yabara noted,¹³⁷⁹ the AU has long been living in self-denial

¹³⁷⁶ See P. Kuryla, 'Pan-Africanism', *Encyclopaedia Britannica* <<https://www.britannica.com/topic/Pan-Africanism>> accessed 12 November 2018.

¹³⁷⁷ See *ibid.*

¹³⁷⁸ See *ibid.*

¹³⁷⁹ A. Boukari-Yabara, *Africa Unite! Une Histoire du Panafricanisme* (La Découverte 2017).

as it tends to ignore the diaspora, whom it has not (yet) invited to join the AU or its institutional structures.

1.2 The Organization of African Unity

The OAU represented the first post-colonial continent-wide institution. Its creation filled a gaping political vacuum and signalled a fundamental search for a common African identity.¹³⁸⁰ The OAU was created on May 25th, 1963, by 32 African states in Addis Ababa, Ethiopia. It became operational when its constitutive treaty, the OAU Charter, came into force on September 13th that same year.

The OAU lasted 39 years, during which it passed 21 multilateral treaties, 16 of which still apply.¹³⁸¹ The 16 applicable treaties include the African Charter on Human and Peoples' Rights, the 1968 Conservation of Nature and Natural Resources, the 1995 African Nuclear Weapon-Free Zone Treaty, and the Convention Governing the Specific Aspects of Refugee Problems in Africa. Through its norms and the jurisprudence from its regional economic communities, this is how Africa has significantly developed international law. Also, the African Charter on Human and Peoples' Rights enriched international law by incorporating the language of duties of citizens.¹³⁸² The Charter also marks the first treaty to recognize the right of peoples to existence¹³⁸³ and the right to a general satisfactory environment as a human right.¹³⁸⁴ The Refugee Convention contributed to the debate on refugee law by broadening the understanding of refugeehood.¹³⁸⁵

The AU succeeded the OAU in 2002. The change also reflected developments on the international scene where the Cold War had just ended, shifting the focus of governments and the OAU from conflicts and security to broader economic and development

¹³⁸⁰ Gawanas op cit 255.

¹³⁸¹ See J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 541.

¹³⁸² See M. Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339.

¹³⁸³ See F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003).

¹³⁸⁴ Dugard op cit 542.

¹³⁸⁵ *ibid.*

goals.¹³⁸⁶ The OAU focused on decolonization whereas the AU concentrates its efforts on unity, economic integration, governance, and development.¹³⁸⁷

African states signed the AU's constitution, the Constitutive Act of the African Union, at the Lomé Summit in Togo in 2000.¹³⁸⁸ The AU Constitutive Act entered into force the following year.¹³⁸⁹ African states officially launched the continental body in Durban, South Africa, on July 11th, 2002, while the former OAU ceased operations on July 9th, 2002. The AU now comprises all African states after Morocco re-joined the AU following a 33-year absence. (Morocco had left the AU because of differences over the status of Western Sahara) The AU therefore comprises 55 member states.¹³⁹⁰ The AU Commission serves as the institution's secretariat. It is headquartered in Addis Ababa, Ethiopia.

The OAU decided to create another institution to succeed it for several reasons. First, the OAU, thought it needed a major overhaul, initially aimed at supporting the decolonization drive on the continent. It became clear by the turn of the century that the OAU had almost completely accomplished that mission. Namibia gained Independence in 1990 and South Africa democratized in 1994. Arguably, the continued occupation of Western Sahara by Morocco left the only blemish on that otherwise admirable record.

Still, critics did not spare the OAU because of what they perceived as the OAU's failure to respond quickly and adequately to conflicts on the continent. For instance, Mangwende remarked that "[f]ar from the OAU becoming an instrument for continental union or one that would lead to a degree of economic and political unity which is essential if Africa is to prosper, it has, by and large, become an object of derision."¹³⁹¹

¹³⁸⁶ Gawanas op cit 253.

¹³⁸⁷ *ibid.*

¹³⁸⁸ African Union, 'Constitutive Act' <<https://au.int/en/constitutive-act>> accessed 10 November 2018.

¹³⁸⁹ *ibid.*

¹³⁹⁰ African Union, 'Member State Profiles' <<https://au.int/memberstates>> accessed 10 November 2018.

¹³⁹¹ W. Mangwende, 'The OAU: An Analysis of the Function, Problems and Prospects of the Organization,' (1984) 12 *Zambezia* 21, 38.

The OAU wished to address some of these criticisms and weaknesses when it established the AU. Article 3 of the Constitutive Act of the AU spells out 14 objectives. These objectives include the promotion of sustainable development,¹³⁹² democratic principles and good governance,¹³⁹³ human rights,¹³⁹⁴ and good health.¹³⁹⁵ Through these objectives, the AU also intends to enhance the position of Africa in global affairs and global negotiations.¹³⁹⁶

2. Institutional structures

The structures of the AU comprise:

1. the AU Assembly,
2. the Executive Council and special technical committees,
3. the AU Commission,
4. the Peace and Security Council,
5. the Pan-African Parliament,
6. financial and economic institutions, and
7. the African Court of Justice.

Namibia strengthened the AU by its actively participating in the work of three crucial decision-making bodies, namely the Assembly of Heads of State and Government, the Executive Council, and the Permanent Representatives Committee.¹³⁹⁷ (Permanent

¹³⁹² Article 3(j) of the Constitutive Act of the African Union, 2000.

¹³⁹³ Article 3(g) of the Constitutive Act of the African Union, 2000.

¹³⁹⁴ Article 3(h) of the Constitutive Act of the African Union, 2000.

¹³⁹⁵ Article 3(n) of the Constitutive Act of the African Union, 2000.

¹³⁹⁶ Article 3(d) of the Constitutive Act of the African Union, 2000 (stating that the objectives of the AU must be, among others, to “promote and defend African common positions on issues of interest to the continent and its peoples”) and Article 3(i) of the Constitutive Act of the African Union, 2000 (stating that the objectives of the AU must also be to “establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations”). See also the Preamble of the Treaty Establishing the African Economic Community, 1991.

¹³⁹⁷ Gawanas op cit 260.

representatives to the AU and other plenipotentiaries¹³⁹⁸ sit in that Permanent Representatives Committee.)¹³⁹⁹

2.1 The Assembly of Heads of State and Government

The AU replaced the OAU Assembly of Heads of State and Government with the AU Assembly. The AU Assembly remains the supreme body in the regional institutional framework.¹⁴⁰⁰ It is made up of its 55 members' Heads of State and Government or their accredited representatives.¹⁴⁰¹ Rwandan President Paul Kagame currently serves as the Chairperson of the Assembly. He replaced Guinea President Alpha Conde, who in turn replaced Chadian President Idriss Déby, in that rotating position.¹⁴⁰²

Among other functions, the Assembly formulates the common policies of the AU,¹⁴⁰³ receives and decides on reports and recommendations made by other structures or organs of the AU,¹⁴⁰⁴ determines membership of the AU,¹⁴⁰⁵ adopts the budget,¹⁴⁰⁶ establishes any AU organ,¹⁴⁰⁷ monitors the implementation of the AU's decisions,¹⁴⁰⁸ and ensures compliance with AU's policies and decisions.¹⁴⁰⁹ The AU Assembly meets once a year in ordinary sessions.¹⁴¹⁰ It may meet more than once a year in extraordinary sessions.¹⁴¹¹

With reference to the budget, the Assembly approved the 2019 budget for the AU at a total of 681.5 million US dollars, a 12%

¹³⁹⁸ A plenipotentiary is a diplomat invested with full power of independent action on behalf of its government.

¹³⁹⁹ Article 21(1) of the Constitutive Act of the African Union, 2000.

¹⁴⁰⁰ Article 6(2) of the Constitutive Act of the African Union, 2000, which reads as follows: "The Assembly shall be the supreme organ of the Union."

¹⁴⁰¹ For a list of all the 55 members of the AU, see African Union, 'Member State Profiles' <<https://au.int/memberstates>> accessed 17 November 2018.

¹⁴⁰² See African Union 'Pan-African Parliament' <<https://au.int/en/organs/pap>> accessed 12 November 2018.

¹⁴⁰³ Article 9(1) (a) of the Constitutive Act of the African Union, 2000.

¹⁴⁰⁴ Article 9(1) (b) of the Constitutive Act of the African Union, 2000.

¹⁴⁰⁵ Article 9(1) (c) of the Constitutive Act of the African Union, 2000.

¹⁴⁰⁶ Article 9(1) (f) of the Constitutive Act of the African Union, 2000.

¹⁴⁰⁷ Article 9(1) (d) of the Constitutive Act of the African Union, 2000.

¹⁴⁰⁸ Article 9(1) (e) of the Constitutive Act of the African Union, 2000.

¹⁴⁰⁹ Article 9(1) (e) of the Constitutive Act of the African Union, 2000.

¹⁴¹⁰ Article 6(3) of the Constitutive Act of the African Union, 2000.

¹⁴¹¹ I imply this statement from Article 6(3) of the Constitutive Act of the African Union, 2000.

decrease from the previous year.¹⁴¹² The AU shrunk its budget to reduce its dependence on external funding.¹⁴¹³ At present, external donors fund 72% of the AU's budget.¹⁴¹⁴ This heavy reliance on external financing dramatically diminishes the AU's independence and opens the continental body to the dictates of foreign interests. China built and financed the construction of the AU's brand new offices, inaugurated in 2012, in Addis Ababa – a potent symbol of the continent's dependence on external actors and priorities.

2.2 The Executive Council and special technical committees

The Executive Council comprises ministers responsible for foreign affairs.¹⁴¹⁵ It formulates policies for member states. These policies cut across a wide spectrum of areas, such as foreign trade, industry, mining and energy, to mention but a few examples.¹⁴¹⁶

Special technical committees provide technical assistance to the Executive Council in formulating the policies mentioned above. The Constitutive Act of the AU provides for special technical committees in areas such as monetary and financial affairs, trade, industry, agriculture, natural resources, energy, science, and technology.¹⁴¹⁷

2.3 The Commission

The AU Commission serves as the secretariat.¹⁴¹⁸ It deals with the day-to-day administration of the AU. It represents the AU and implements the decisions made by its various organs. The members of the secretariat are the Chair, the Deputy Chair and eight commissioners. Commissioners each administer a portfolio.¹⁴¹⁹ The appointed Moussa Faki, a national of Chad, as Chairperson of the AU Commission on 30 January 2017. In 2003, Namibia nominated

¹⁴¹² African Union, 'Financial Reforms at the African Union Lead to Massive Cuts of the Union's Budget'

<<https://au.int/en/pressreleases/20180706/financial-reforms-african-union-lead-massive-cuts-union%E2%80%99s-budget>> accessed 12 November 2018.

¹⁴¹³ *ibid.*

¹⁴¹⁴ African Union, 'AU Reforms: Sustainable Financing'

<<https://au.int/en/AUReforms/areas/financing>> accessed 12 November 2018.

¹⁴¹⁵ Article 10(1) of the Constitutive Act of the African Union, 2000.

¹⁴¹⁶ Article 13 of the Constitutive Act of the African Union, 2000.

¹⁴¹⁷ Article 15 of the Constitutive Act of the AU.

¹⁴¹⁸ Article 30(1) of the Constitutive Act of the African Union, 2000.

¹⁴¹⁹ Article 3 of the Statutes of the Commission of the African Union.

its former Ombudsman Bience Gawanas to serve on the Commission. The AU appointed Gawanas as Commissioner for Social Affairs – a position she held until 2012.

2.4 The Peace and Security Council

Like the Security Council of the United Nations when it comes to international peace and security, the Peace and Security Council of the AU concerns itself with matters affecting peace and security in Africa.¹⁴²⁰ Namibia chaired the Council at least once in February 2011.

The Council prevents, manages and resolves conflict; develops a common defence policy; and protects human rights and fundamental freedoms.¹⁴²¹ The Peace and Security Council also serves as a collective early-warning system.¹⁴²²

2.5 The Pan-African Parliament

The Pan-African Parliament bears responsibility for the inclusive participation of African peoples in the economic integration and development of the continent.¹⁴²³ It is inspired by and modelled on the Parliament of the European Union.¹⁴²⁴ African states inaugurated the Pan-African Parliament on March 18th, 2004. It sits in Midrand in the Gauteng Province of South Africa.

Each member state sends five representatives, who should include at least one woman. At present, the Parliament has 229 members representing 51 countries. Members of the Namibian Parliament also participate in the activities and several committees of the Pan-African Parliament.¹⁴²⁵

¹⁴²⁰ Article 20(bis) of the Constitutive Act of the African Union, 2000.

¹⁴²¹ Article 7 of the Constitutive Act of the African Union, 2000.

¹⁴²² The Protocol on the PSC created an early warning system which informs the Chairperson of the PSC to (1) advise the PSC on potential conflicts and threats to peace and security, and to (2) recommend the best course of action: Article 12 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002.

¹⁴²³ Article 17 of the Constitutive Act of the African Union, 2000.

¹⁴²⁴ Dugard op cit 544.

¹⁴²⁵ Gawanas op cit 260.

Roger Nkodo Ndong, a national of Cameroon, serves as the President of the Parliament. The Parliament re-elected Ndong in that position in May 2018.

The Parliament has legislative and advisory powers.¹⁴²⁶ But so far it has only exercised consultative and advisory powers.¹⁴²⁷ The Parliament does not exercise legislative powers yet because most African states have not ratified the 2014 AU Protocol¹⁴²⁸ that grants legislative powers to the Pan-African Parliament. The Protocol still awaits the required number of 28 ratifications before it can enter into force. This situation has led to a deep crisis within the Parliament. Members of the Parliament fumed about the Parliament's lack of legislative powers. As Loyd Shivambu, a representative of South Africa, reportedly remarked:¹⁴²⁹

By definition, a parliament is supposed to be a legislative body, but this forum is not a parliament, it is simply a platform for discussion that does not have legislative power.

2.6 Financial and economic institutions

The financial and economic institutions of the AU include the Economic, Social and Cultural Council; the African Central Bank; the African Monetary Fund; and the African Investment Bank.¹⁴³⁰ They share a common goal: to bring about economic growth and development, and to speed up the integration of the continent. Except for the Economic, Social and Cultural Council, none of these institutions are operational.

The Economic, Social and Cultural Council became operational in September 2008 when it elected its first permanent general assembly in Dar es Salaam, Tanzania. Since the election of the

¹⁴²⁶ Article 8 of the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament, 2014.

¹⁴²⁷ African Union, 'Pan-African Parliament' <<https://au.int/en/organs/pap>> accessed 10 November 2018.

¹⁴²⁸ Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament, 2014.

¹⁴²⁹ I. Annor, 'Pan-African in Crisis as It Lacks Legislative Powers' *Africanews* <<http://www.africanews.com/2017/10/17/pan-african-parliament-in-crisis-as-it-lacks-legislative-powers/>> accessed 12 November 2018.

¹⁴³⁰ Article 19 of the Constitutive Act of the African Union, 2000.

Permanent General Assembly, the challenges of the Council include building its own institutions and devising a suitable arrangement for partnering with other units and organs as it discharges its main function of providing advisory opinions to the AU. These are the issues that have engaged and keep on engaging the Council as a new institution of the AU.¹⁴³¹

2.7 The African Court of Justice

The African Court of Justice acts as the principal judicial organ of the AU. It plays at the continental level the role that the International Court of Justice does on the global scene.¹⁴³² The AU adopted the Maputo Protocol, establishing the African Court of Justice, in July 2003. It came into force on 11 February 2009.¹⁴³³ Meanwhile, on July 1st, 2008, the AU merged the African Court of Justice with the African Court of Human and Peoples' Rights.

Since the merger, the name of the fused court has become 'African Court of Justice and Human Rights.' The 2008 Protocol on the Statute of the African Court of Justice and Human Rights will replace the Maputo Protocol. The African Court of Justice and Human Rights interprets the Constitutive Act of the AU. The work of the Court is complemented by the African Commission on Human and Peoples' Rights, which has the mission to monitor the protection and promotion of human rights in Africa.¹⁴³⁴

In Chapter 16 (on human rights), I elaborate on the African Commission on Human and Peoples' Rights.

¹⁴³¹ African Union Advisory Board on Corruption, 'The Economic, Social and Cultural Council of the African Union (ECOSOCC)' <<http://www.aumaticorruption.org/organs/the-economic-social-and-cultural-council-of-the-african-union-ecosocc>> accessed 12 November 2018.

¹⁴³² K.D. Magliveras and G. Naldi, 'The African Court of Justice' (2006) 66 *Zaöerv* 187.

¹⁴³³ *ibid.*

¹⁴³⁴ M. Evans and R. Murray, *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd edn, Cambridge University Press 2008) 22.

3. Namibia and the OAU/AU

3.1 Before Namibian Independence

The OAU assisted Namibia in its struggle for liberation and independence. However, before Independence in 1990, Namibia could not formally join the OAU because the international community had not yet recognized Namibia as independent state, despite the sympathy and the goodwill it enjoyed from that community. The OAU could therefore only provide assistance to the South West African People's Organization (SWAPO), the liberation movement that both the OAU and the United Nations (UN) regarded as the legitimate representative of the Namibian people, without however recognizing Namibia as a state or as one of its members.

In June 1971, during its 8th ordinary session, the Assembly of Heads of State and Government expressly condemned that South Africa's continued occupation of Namibia and requested that South Africa withdrew from Namibia. The following year, it voiced support for the liberation struggle of the Namibian people. For many years, the continental body lent political and moral support to the cause of the Namibian people. For instance, it lobbied for SWAPO to gain observer status at both the OAU and the UN.¹⁴³⁵ It convinced states to impose sanctions on South Africa and, in 1968, its efforts resulted in the international community declaring apartheid a crime against humanity.¹⁴³⁶ On 21 March 2018, the OAU had fulfilled one of its core objectives when Namibia acceded to independence and statehood.

3.2 After Independence and after the OAU

Since its Independence in 1990, Namibia has been actively engaged in the work of the AU. This engagement is in line with state policies outlined in the Namibian Constitution:¹⁴³⁷

¹⁴³⁵ Gawanas op cit 256.

¹⁴³⁶ *ibid.*

¹⁴³⁷ Article 96 of the Constitution of the Republic of Namibia, 1990.

The State shall endeavour to ensure that in its international relations it...
(b) promotes international cooperation, peace and security; [and] (c) creates and maintains just and mutually beneficial relationships among nations.

Namibia achieves that “international cooperation, peace and security” and maintains “just and mutually beneficial relationships” through its activities in AU structures such as the Peace and Security Council, the Assembly, and the Executive Council.

Notably, Namibia contributed to the AU by working on the transformation of the OAU into the AU and the formulation of 2063 Agenda. Other examples of Namibia’s work in the structures of the AU include the Anti-Corruption Advisory Board where the Director of the Namibian Anti-Corruption Commission served as a member until 2011.¹⁴³⁸ They also include Namibia’s activities within the Committee on Intelligence Services in Africa until 2012.¹⁴³⁹ The security architecture of the AU obliges member states to share intelligence as part of the AU’s early-warning mechanism Committee and as a way to prevent and resolve conflicts.¹⁴⁴⁰

4. Initiatives of the AU

4.1 The New Partnership for African Development

At the turn of the century, three African leaders worked to establish the New Partnership for African Development (NEPAD). NEPAD was initiated by Thabo Mbeki (South Africa) while Abdelaziz Buteflika (Algeria) and Abdoulaye Wade (Senegal) further developed this project. Ultimately, NEPAD seeks to consolidate democracy and sound economic management in Africa.

To achieve its objectives, NEPAD primarily uses the African Peer Review Mechanism (APRM). The APRM reviews the performance of an African state through its peers according to principles of good governance that the state has voluntarily subscribed to. By 2011, only 14 African states had agreed to the APRM. The biggest challenges include the slow pace of the APRM process and the lack of commitment by states. Another challenge lies

¹⁴³⁸ Gawanas op cit 260.

¹⁴³⁹ *ibid.*

¹⁴⁴⁰ *ibid.*

in the perception of some experts that NEPAD is ideologically a neoliberal initiative like the infamous structural adjustment programmes.

4.2 Agenda 2063

On 25 May 2013, the AU launched the 2063 Agenda. The launch of the Agenda took place when the AU was celebrating its 50th anniversary. The celebrations and the launch were attended by Namibia founding President Sam Nujoma and the then-President Hifikepunye Pohamba as well as their counterparts from other African nations.

Agenda 2063 provides the AU with a strategic framework to transform Africa in the social and economic fields over the next 50 years.¹⁴⁴¹ It builds on and seeks to accelerate past and existing AU initiatives aimed at fostering growth and sustainable development, such as the Lagos Plan of Action, the Abuja Treaty,¹⁴⁴² the Programme for Infrastructural Development in Africa (PIDA), and NEPAD.¹⁴⁴³

5. Central issues

The AU has faced a slew of challenges, from its heavy dependence on external funds to its mixed record in protecting human rights, to its confrontation with the International Criminal Court. Of all those challenges, what may have caused it the greatest damage is the perception that the AU is more a presidents' club than an organization representing the ordinary African. The OAU already suffered from the perception that it become distant from the ordinary African on the street and that it had thus morphed into an organization for African leaders.¹⁴⁴⁴

¹⁴⁴¹ African Union, 'Agenda2063' <<https://au.int/en/agenda2063>> accessed 12 November 2018.

¹⁴⁴² The Abuja Treaty refers to the Treaty Establishing the African Economic Community, 1991.

¹⁴⁴³ African Union, 'Agenda2063' op cit.

¹⁴⁴⁴ Gawanas op cit 255.

5.1 Peace, security, and humanitarian interventions

The Peace and Security Council (PSC) provides a regional mechanism for the maintenance of international peace and security. Article 52(2) of the Charter of the United Nations provides for regional support mechanisms. It encourages member states to strive to settle local disputes through regional arrangements before referring those disputes to the Security Council of the United Nations. The AU is one such regional arrangement while the PSC of the AU is the regional equivalent of the Security Council of the United Nations.

The Security Council of the United Nations can resort to regional arrangements for enforcement actions.¹⁴⁴⁵ In 2011, the Security Council of the United Nations authorized the NATO to use ‘all necessary measures’ to protect civilians in Libya, which enabled the NATO to use military force against Muammar Gaddafi’s regime.¹⁴⁴⁶ The Security Council of the United Nations could authorize the AU to use force in any situation that threatens or breaches regional peace.¹⁴⁴⁷

The PSC of the AU could in turn authorize peace missions in any member state.¹⁴⁴⁸ It can also recommend to the Assembly to intervene in certain situations where grave crimes (i.e., war crimes, crimes against humanity, and genocide) have been or are suspected to have been perpetrated.¹⁴⁴⁹ Article 4(h) of the Constitutive Act of the AU, as amended in 2003, provides for humanitarian interventions in certain situations upon recommendation of the PSC. The 2003 amendment of Article 4(h) extends the PSC’s power to order humanitarian interventions “to serious threats to legitimate order to restore peace and stability” to an AU member state upon recommendation of the PSC.¹⁴⁵⁰

¹⁴⁴⁵ Article 53 of the Charter of the United Nations, 1945.

¹⁴⁴⁶ S.C. Res. 1973, U.N. Doc. S/RES/1973 (11 March 1973).

¹⁴⁴⁷ Article 42 of the Charter of the United Nations, 1945.

¹⁴⁴⁸ Article 7(1) (c)-(d) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002.

¹⁴⁴⁹ Article 7(1) (e) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002.

¹⁴⁵⁰ Paragraph 4(h) of the Protocol on Amendments to the Constitutive Act of the African Union, 2003.

What African policy makers still have to settle authoritatively is whether the PSC of the AU needs authorization from the Security Council of the United Nations before the PSC can order humanitarian intervention. The AU published a document in March 2005 entitled ‘The Common African Position on the Proposed Reform of the United Nations’ and which provided that, although authorization from the Security Council of the United Nations is required for the AU’s authorization of humanitarian interventions, such authorization could come after humanitarian interventions have been ordered.¹⁴⁵¹ This document is commonly referred to as the ‘Ezulwini Consensus’. This position seems to defeat the purpose of an ‘authorization’ and of Article 52(2) of the Charter of the United Nations. Amvane argues that, though in principle the AU needs authorisation in accordance with Article 53 of the Charter of the United Nations, the AU could, under certain circumstances, implement humanitarian intervention without prior authorisation by the United Nations Security Council.¹⁴⁵²

Following its mandate in terms of regional peace and security, the AU has ordered a few interventions in Africa. These include AU missions in Burundi (AMIB) in 2003, in Sudan (AMIS) in 2004, and in Somalia (AMISOM) in 2007.

The AU has created an African Standby Force for rapid-response deployment in certain situations in Africa.¹⁴⁵³ However, the Force is not yet operational due to a lack of capacity and resources. The African Standby Force comprises military and civilian personnel, namely troops, observers, police officers, and civilian experts.¹⁴⁵⁴

¹⁴⁵¹ African Union, ‘The Common Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus”’ (2005) <http://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf> accessed 11 November 2018.

¹⁴⁵² G. Amvane, ‘Intervention Pursuant to Article 4(h) of the Constitutive Act of African Union Without United Nations Security Council Authorisation’, (2015) 15 *African Human Rights Law Journal* 282.

¹⁴⁵³ Article 13(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002.

¹⁴⁵⁴ *ibid.*

5.2 Should the African Union get a permanent seat on the UN Security Council?

The AU set up a Committee of Ten Heads of State and Government with the specific goal of advocating AU's position on the reform of the United Nations (UN). Namibia participated in that Committee as a member. The AU has recommended two permanent seats and five non-permanent seats for Africa within the UN Security Council. This position is contained in the Ezulwini Consensus¹⁴⁵⁵ and the Sirte Declaration.¹⁴⁵⁶ The Security Council has so far not accepted the position of the AU. The AU bases its position on, among other things, the fact that most conflicts which preoccupies the Security Council comes from Africa.

Namibia proposes two permanent seats for Africa on the UN Security Council.¹⁴⁵⁷ In January 2016, Namibia maintained that it is an "historical injustice" that Africa remained the only continent not represented on the UN Security Council. Namibian President Hage Geingob finds no justification for denying 54 countries a place among the permanent members of the Security Council.¹⁴⁵⁸ In the words of Minister for International Cooperation Netumbo Nandi-Ndaitwah:¹⁴⁵⁹

Namibia reiterates that correcting the historical injustice suffered by the African continent, as the only continent not represented in the permanent category of the UNSC, and at the same time under-represented in the non-permanent category is imperative, long overdue and, therefore, should be addressed as a matter of great priority.

¹⁴⁵⁵ African Union, 'The Common Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"' (2005) <http://www.un.org/en/africa/osaa/pdf/au/cap_screform_2005.pdf> accessed 11 November 2018.

¹⁴⁵⁶ Assembly of the African Union, 'Sirte Declaration on the Reform of the United Nations' (2005) <https://au.int/sites/default/files/decisions/9552-assembly_en_4_5_july_2005_auc_fifth_ordinary_session_decisions_declarations_and_resolution.pdf> accessed 11 November 2018.

¹⁴⁵⁷ H. Geingob, 'Address by His Excellency President Hage Geingob on the Occasion of the Official Launch of the 'Theo Ben-Gurirab Lecture Series' (Windhoek, 31 July 2017).

¹⁴⁵⁸ *ibid.*

¹⁴⁵⁹ 'AU Pushes for Reform of UN Security Council... African Leaders Demand Representation and Veto Right' *New Era* (Windhoek, 15 January 2016).

President Geingob added that the UN needs a plan for inclusivity if it wants a more representative global institution.¹⁴⁶⁰ Obtaining greater representation and veto rights at the UN Security Council appears to be no walk in the park. However, if the continent cannot achieve these two goals, it may nonetheless insist on a position between a permanent member seat and an ordinary member seat.¹⁴⁶¹ Stated differently, the UN can give Africa a special position on the Security Council that grants it certain rights, privileges and benefits higher than those of ordinary members but short of those enjoyed by the five permanent members.

5.3 The AU and the International Criminal Court

Although Africa is the region of the world most represented in the membership of the International Criminal Court and in its prosecution activities, recent relationships between the AU and the International Criminal Court (ICC) have soured. Indeed, the continent has contributed to the ICC in terms of (1) the membership and (2) the composition of the Court, (3) the situations before the Court, and (4) the incorporation of the Rome State in domestic laws.¹⁴⁶²

The tension started in 2009 when the ICC decided to issue an arrest warrant against a sitting Head of State, President Omar al-Bashir of Sudan. You can trace back this tense situation to the decision of the UN Security Council in 2005 to refer the situation in Darfur to the ICC for prosecution. The AU has asked the Security Council to rely on Article 16 of the Rome Statute to suspend the proceedings and the arrest warrant against President al-Bashir. The Security Council did not heed the AU's advice.

¹⁴⁶⁰ Geingob op cit.

¹⁴⁶¹ I am grateful to Ms. Emma Teofelus for suggesting this solution.

¹⁴⁶² N. Bohler-Muller and D.P. Zongwe, 'It Is Self-Defeating for Africa (and South Africa) to Withdraw From the International Criminal Court' (2017) 9 *Namibia Law Journal* 115, 129. See also C.S. Igwe, 'The ICC's Favourite Customer: Africa and International Law' (2008) 41 *Comparative and International Law Journal of South Africa* 294, 295. See also D.P. Zongwe, 'Taking Leaves Out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo' (2013) 46 *Israel Law Review* 249 (showing how the constitution of the Democratic Republic of the Congo incorporated in the domestic legal system duly ratified treaties such as the Rome Statute establishing the International Criminal Court).

In 2009 in Libya, the AU urged all its member states not to cooperate with the ICC in effecting the arrest warrant against the Sudanese President.¹⁴⁶³ The AU made this call in the ‘Sirte Declaration’. (Do not mistake this Sirte Declaration on the ICC for the Sirte Declaration made in 2005 on the reform of the UN) This is the first act in the tension between the AU and the ICC. The relationship between the two institutions became even bitter when the ICC prosecuted the Kenyan President Uhuru Kenyatta and his Vice-President William Ruto.

In 2016, Namibia declared their intention to leave the ICC.¹⁴⁶⁴ So far, however, Namibia has not acted on its threat to pull out of the ICC.

Calls for AU member states to withdraw from the ICC *en masse* and the fiery rhetoric against the ICC may prompt the demise of that international institution.¹⁴⁶⁵ Most importantly, they are self-defeating because, in doing so, the AU undermines its own values, its own contributions to the ICC, and its own efforts at peace and stability.¹⁴⁶⁶ The stance against the ICC is also premature given that the continent does not yet have the institutional capacity to prosecute the worst international crimes. Even the newly established African Court of Justice and Human Rights lacks incisive teeth. As Bohler-Muller & Zongwe put it:¹⁴⁶⁷

If anything, the AU has made it virtually impossible for any continental court to try sitting Head of States and any senior government officials accountable for international crimes. In June 2014, the AU amended the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) to prohibit the African Court of Justice and Human Rights

¹⁴⁶³ See M. du Plessis, ‘Recent Cases and Developments: South Africa and the International Criminal Court’ (2009) 3 South African Journal of Criminal Justice 443.

¹⁴⁶⁴ ‘Ndaitwah Clarifies Namibia’s Withdrawal From ICC’ *New Era* (Windhoek, 11 March 2016) <<https://www.newera.com.na/2016/03/11/ndaitwah-clarifies-namibias-withdrawal-icc/>> accessed 24 August 2016.

¹⁴⁶⁵ Bohler-Muller and Zongwe op cit 116.

¹⁴⁶⁶ *ibid* 128-133.

¹⁴⁶⁷ *ibid* 134.

from commencing or continuing any charge against any sitting Head of State or any other senior government official during their tenure of office.¹⁴⁶⁸

What is more, Agwu describes the criminal jurisdiction of the African Court of Justice and Human Rights as unnecessarily duplicating the ICC.¹⁴⁶⁹ While creating a regional institution to prosecute heinous international crimes deserves praise and applause, what matters the most is whether that regional institution can prosecute those crimes effectively.

5.4 The Africa ‘shithole’ incident

At a meeting on immigration in the US in January 2018, President Donald Trump reportedly described Haiti, El Salvador and unnamed nations in Africa as “shithole countries”. Sadly, the African response to President Donald Trump’s slur lacked strategy.¹⁴⁷⁰ That incident illustrates the kind of hesitations and timidity that stop the AU from standing up to leaders in powerful nations for the rights of African people. The AU’s over-dependence on external funding further subdues the continental body.

The AU demanded a retraction and an apology. The only dissonant voice was Uganda President Yoweri Museveni, who “love[s] Trump for being frank with Africans”.¹⁴⁷¹

As remarked by Selma Ashipala-Musavyi, the Permanent Secretary of the Namibian International Relations Ministry, Trump’s rude comment has “no place in diplomatic discourse”.¹⁴⁷² But, with the arrival of Trump in the White House last year, came the rise of White-supremacy ideology and the burial of deft diplomacy. To be fair, Trump is not the first Head of State to use undiplomatic or racist

¹⁴⁶⁸ Article 46A bis of the Protocol on Amendments to the Statute of the African Court of Justice and Human Rights, 2014.

¹⁴⁶⁹ F.A. Agwu, ‘The African Court of Justice and Human Rights: The Future of International Criminal Justice in Africa’ (2013) 6 *Africa Review* 30.

¹⁴⁷⁰ This section draws mostly from a piece I published in a Namibian daily: D. Zongwe, ‘Trump’s “Shithole” Africa Slur or the Death of Diplomacy’ *The Namibian* (Windhoek, 20 February 2018) 7.

¹⁴⁷¹ ‘Uganda’s Museveni: I Love Trum for Being Frank with Africans’ *BBC* (23 January 2018) <<https://www.bbc.com/news/world-africa-42795588>> accessed 12 November 2018.

¹⁴⁷² T. Tjihenuna, ‘We Do Not Appreciate Trump’s Comments – Ashipala-Musavyi’ *The Namibian* (Windhoek, 13 January 2018).

language. For instance, Rodrigo Duterte (Philippines), Robert Mugabe (Zimbabwe), and Mahmoud Ahmadinejad (Iran) are all known for their venomous tongue.

What makes Trump's "shithole" comment unprecedented in history is not its undiplomatic tone; it is its sheer vulgarity, which leaves no room for doubting that, far from a frank and objective opinion, it was nothing other than an insult. Unfortunately, the response of African nations was tepid, if not timid. In the circumstances, the smart strategy consisted in raising the costs of engaging in the undesirable behavior (e.g., insults) so that the offending state cannot engage in such conduct without at the same time inflicting on itself great reputational harm. If Trump used those words, it is because he believed there is no heavy price to pay for insulting Africans and Blacks in general. It is that belief that the AU should have shattered. The AU should have rallied support from allies from other continents. Research by scholars such as Andrew Guzman¹⁴⁷³ shows that states' behavior on the international scene is to a significant extent guided by a concern for their reputation.

On 21 January 2018, French President Emmanuel Macron told the media that he shared the continent's outrage at Trump's offensive comment. It is thus not difficult to imagine how the AU could have obtained official statements from allies and leaders such as Macron, Xi Jinping, Angela Merkel, and Vladimir Putin that condemned Trump's language or reaffirmed their stance against racism. Plus, getting support from the wider international community would have changed the perception that this was just an Africa-Trump duel.

The strategy would have not only altered the payoffs and calculations of Trump or any Trump wannabes, it would have effectively isolated him. This strategy was at play following the poisoning of a former Russian spy Sergei Skripal and his daughter Yulia in March 2018 in Salisbury, United Kingdom (UK). The British authorities accused Russian intelligence of orchestrating the failed

¹⁴⁷³ See A.T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2007). See also G.W. Downs and M.A. Jones, 'Reputation, Compliance, and International Law' (2002) 31 *The Journal of Legal Studies* S95. For a more critical view of the role of reputation in compliance with international law norms, see R. Brewster, 'Unpacking the State's Reputation' (2009) 50 *Harvard International Law Journal* 231.

attempt to kill Sergei Skripal with a nerve agent. But although Russia denied the allegations by the UK government and cited the lack of evidence, the UK went on to garner support from its allies. As a result, more than 20 allies (including the US, Canada, France, Germany, and Ukraine) – in actions coordinated with their UK counterpart – expelled from their territories Russian diplomats with intelligence-agency backgrounds.¹⁴⁷⁴ That mass expulsion of Russian diplomats and those coordinated actions effectively isolated Russia in the Skripal matter despite Russia denials. The UK diplomacy in this instance gave a masterclass on what a shrewd AU answer to Trump’s slur could have looked like.

That said, the AU strategy is not without merit. First of all, it demanded an apology from Trump, “not only to the Africans, but to all people of African descent around the globe”. Apparently, Trump’s jibe jolted the AU into reclaiming its lost Pan-Africanist roots. What is more, the fact that Africans spoke collectively through the largely lethargic AU has made the slur costly for Trump, though it did not shame him nearly as much as it would if the AU had enlisted its allies in its protest.

5.5 Human rights

Human rights constitute one the cornerstones of the Constitutive Act of the AU. AU member states owe a duty to promote human rights, including gender equality. From the text of the Constitutive Act of the AU, it is evident that the AU allows some restriction on state sovereignty and non-interference in internal affairs such that it can interfere in certain specified cases in the affairs of a member state where serious human rights violations occur.

The AU has enacted a number of key legal instruments regarding human rights. Notable examples include the African Charter on

¹⁴⁷⁴ ‘Western Allies Expel Scores of Russian Diplomats Over Skripal Attack’ *The Guardian* (26 March 2018) <<https://www.theguardian.com/uk-news/2018/mar/26/four-eu-states-set-to-expel-russian-diplomats-over-skripal-attack>> accessed 12 November 2018; H. Hellyatt, ‘Over 100 Russian Diplomats and Counting: The List of Countries Punishing Moscow After UK Poisoning Grows’ *CNBC* (27 March 2018) <<https://www.cnbc.com/2018/03/27/russian-diplomats-expelled-the-list-of-countries-punishing-moscow-grows.html>> accessed 12 November 2018.

Human and Peoples' Rights and instruments on unconstitutional changes of government.

Like I said a few paragraphs ago, the AU presents a mixed record when it comes to the protection of human rights. For want of space, I cannot elaborate further on human rights in this chapter. I however take up the subject of human rights in Africa and in general, and devote my attention to it right away in the next chapter.

HUMAN RIGHTS

Liberation-struggle icon Andimba Toivo ya Toivo is often quoted as saying:¹⁴⁷⁵

We are Namibians, and not South Africans. We do not now, and will not in the future, recognize your right to govern us, to make laws for us in which we have no say, to treat our country as if it were your property and us as if you were our masters.

The man who co-habited with Nelson Mandela in the Robben Island prison was reacting to South Africa's occupation of South West Africa/Namibia. This quotation illustrates how the leaders of the Namibian liberation struggle deployed the language and vocabulary of human rights for their emancipatory project. In this chapter, I ponder the international and national 'origins' of human rights and insist, nevertheless, that conceptions of justice, fairness, and human rights ultimately originate in humanity itself. Seen like this, the proposition that human rights come from above (i.e., the international community of nations) or from neighbours is a flat contradiction in terms.

Human rights spread through Namibia's political and legal culture. The Preamble of the Namibian Constitution reads as follows:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;

¹⁴⁷⁵ See, for example, A. Cowell, 'Andimba Toivo ya Toivo, Namibian Independence Leader, Dies at 92' *New York Times* (10 June 2017) <<https://www.nytimes.com/2017/06/10/world/africa/andimba-toivo-ya-toivo-dead.html>> accessed 17 November 2018.

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas we the people of Namibia –

...

desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world;

...

committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity.

The language of human rights fills the Preamble. Namibia's embrace of human rights even shows in its ranking by Freedom House as a free country with a 'robust' protection of human rights.¹⁴⁷⁶

Human rights and fundamental freedoms in Namibia owe a great deal to international law and the internationalist inclinations of its leaders. They also inform my observation that international law largely defined Namibia. I develop these points in five steps. First, I sketch the history of international human rights. Then, I discuss the international bill of rights and the major treaty bodies, both at the regional and international levels. Next, I focus on Africa as a regional human rights system before zooming in on human rights in Namibia. I close this chapter with a critique of the human rights movement.

One of the primary objectives of international law is to protect human rights.¹⁴⁷⁷ The international law of human rights evolved over the past seven decades and go back to the time when a number of states adopted the Charter of the United Nations (UN Charter).¹⁴⁷⁸ Indeed, the contemporary general consensus on human rights

¹⁴⁷⁶ Freedom House, 'Freedom in the World 2018: Namibia' <<https://freedomhouse.org/report/freedom-world/2018/namibia>> accessed 17 November 2018.

¹⁴⁷⁷ Council on Foreign Relations, 'The Global Human Rights Regime' <<https://www.cfr.org/report/global-human-rights-regime>> accessed 17 November 2018.

¹⁴⁷⁸ T. Buergenthal and S.D. Murphy, *Public International Law in a Nutshell* (5th edn, West 2002) 134.

emerged after World War II.¹⁴⁷⁹ Of course, the UN Charter did not create the international law of human rights. International human rights law existed long before the advent of the UN Charter.¹⁴⁸⁰ What the Charter did is to lay the foundation for a *comprehensive development* of the international legal rules protecting human rights.¹⁴⁸¹ While most scholars recognize the importance of human rights, no consensus exists as to their precise nature and content.¹⁴⁸²

You will find the nature of human rights hugely complex.¹⁴⁸³ Western nations initially tended to view human rights as consisting basically of civil and political rights such as the right to vote, freedom of speech, etc.¹⁴⁸⁴ By contrast, the Soviet Union did not only recognize civil and political rights, they also emphasized the role of the state.¹⁴⁸⁵ It saw the state as the source of human rights.¹⁴⁸⁶ Third World states would incorporate these two perspectives.¹⁴⁸⁷ What distinguished the Third World approach is that they would also insist on general developmental issues.¹⁴⁸⁸ As a result, the traditional Western conception of civil and political rights tended to lose priority in the concerns of developing states.¹⁴⁸⁹ Similarly, since Independence in 1990, Namibia has developed a rich human rights culture and has instilled human rights not only in the country's political practices, but it deployed them for developmental purposes as well.

¹⁴⁷⁹ G.O.H.B. Chen and B. Offord, *Activating Human Rights and Peace: Theories, Practices and Contexts* (Routledge 2016) 46.

¹⁴⁸⁰ S. Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016).

¹⁴⁸¹ Buergenthal and Murphy op cit 134.

¹⁴⁸² M.N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 247.

¹⁴⁸³ 'Human Rights' *Internet Encyclopedia of Philosophy*
<<https://www.iep.utm.edu/hum-rts/>> accessed 17 November 2018.

¹⁴⁸⁴ Shaw 249-250.

¹⁴⁸⁵ *ibid* 250.

¹⁴⁸⁶ *ibid*.

¹⁴⁸⁷ *ibid* 251.

¹⁴⁸⁸ *ibid*.

¹⁴⁸⁹ *ibid*.

1. Historical background

States can protect human rights at the level of national law¹⁴⁹⁰ or international law.¹⁴⁹¹ Attempts to historicize human rights can so easily mislead you and make you forget that the notion of rights belonging to people by the mere fact of their human condition did not spring at any point in the past. Human rights originate in humanity and, in that sense, it describes the whole of humankind. This universal notion of human rights has no history.

That said, the idea that the law should protect the rights of individuals against abuses by the government finds its roots in natural law.¹⁴⁹² In the 19th century, a few vague principles allowed intervention on the territory of another country.¹⁴⁹³ One such principle concerned humanitarian intervention¹⁴⁹⁴ – a principle initiated by Hugo Grotius.¹⁴⁹⁵ The doctrine lacked clarity, and intervening states would invoke it to advance their own interests.¹⁴⁹⁶ Today, the UN may authorize such intervention in terms of Chapter VII of the UN Charter.¹⁴⁹⁷ The Peace and Security Council of the African Union also has the power order humanitarian intervention in any of its 55 members.¹⁴⁹⁸

Before 1945, the end of World War II, international law did not concern itself with the treatment of individuals in their own states or aliens in those states.¹⁴⁹⁹ The scale and seriousness of the mass

¹⁴⁹⁰ H. Melber, 'Namibia and Human Rights' *The Namibian* (Windhoek, 8 July 2016) 11.

¹⁴⁹¹ United Nations Human Rights Office of the High Commissioner, 'International Human Rights Law' <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> accessed 17 November 2018.

¹⁴⁹² M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen 2003) 261.

¹⁴⁹³ I. Brownlie, *Principles of Public International Law* (8th edn, Oxford University Press 2012) 568-569.

¹⁴⁹⁴ *ibid.*

¹⁴⁹⁵ Buergethal and Murphy *op cit* 135.

¹⁴⁹⁶ Brownlie *op cit* 569.

¹⁴⁹⁷ Article 52(2) of the Charter of the United Nations, 1945.

¹⁴⁹⁸ Article 4(h) of the Constitutive Act of the African Union, 2000.

¹⁴⁹⁹ The Editors of Encyclopaedia Britannica, 'International Human Rights: Prescription And Enforcement', *Encyclopaedia Britannica* <<https://www.britannica.com/topic/human-rights/International-human-rights-prescription-and-enforcement>> accessed 17 November 2018.

atrocities committed during World War II ‘shocked the conscience of humanity’.¹⁵⁰⁰ Those atrocities led the international community to heighten the attention of the international community on the legal and social protection of human rights.¹⁵⁰¹ Notably, Hersch Lauterpacht¹⁵⁰² called for the adoption of an international bill of rights. The international community made the commitment that this sort of large-scale atrocities should not happen ever again.¹⁵⁰³ The seeds of this deep concern for human rights could be found in humanitarian law, especially the Geneva Conventions, which aim at alleviating the suffering of both combatants and civilians in times of war.¹⁵⁰⁴

The concern for human rights also originated in the work of the League of Nations. The League of Nations achieved at least two things in that respect. First, the League of Nations initiated a ‘sacred trust of civilization’ to promote the wellbeing of peoples who were thought not yet able to administer themselves.¹⁵⁰⁵ That ‘sacred trust of civilization’ materialized in, among other things, the trust given to South Africa to administer Namibia on behalf of the British Crown. Although the League of Nations did not provide for the protection of national minorities, there was an opportunity to link the peace settlement machinery of the League with the obligations with regard to the treatment of national minorities.¹⁵⁰⁶ This led to a few treaties protecting national minorities.¹⁵⁰⁷

¹⁵⁰⁰ See The Holocaust, ‘Genocide And Human Rights’ <<http://www.holocaust.com.au/The-Facts/Genocide-and-Human-Rights>> accessed 17 November 2018. See also D. Scheffer, ‘Genocide and Atrocity Crimes’ (2006) 1 *Genocide Studies and Prevention: An International Journal* 229.

¹⁵⁰¹ Brownlie op cit 568.

¹⁵⁰² See A.F. Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law’ (2009) 20 *European Journal of International Law* 1163-1194.

¹⁵⁰³ L. Glanville, ‘The Responsibility to Protect Beyond Borders’ (2012) *Human Rights Law Review* 1.

¹⁵⁰⁴ H.-P. Gasser, *International Humanitarian Law: An Introduction* (Henry Dunant Institute/Paul Haupt 1998).

¹⁵⁰⁵ For an account of how the ‘sacred trust of civilisation’ influenced the fate of South West Africa, see L.A. Jinadu, ‘South West Africa: A Study in the “Sacred Trust” Thesis’ (1971) 14 *African Studies Review* 369.

¹⁵⁰⁶ Brownlie op cit 569.

¹⁵⁰⁷ See International Labour Organization, *The International Labour Organization’s Fundamental Conventions* (International Labour Organization 2003).

The arrangements for giving a special status to the inhabitants of certain territories under the mandate system of the League of Nations and the trusteeship system of the United Nations look similar.¹⁵⁰⁸ Regarding the mandate, the International Court of Justice (ICJ) declared:¹⁵⁰⁹

The Mandate was created, in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization.

The international status of such territory helped the international community to avoid certain difficult problems and to hold South Africa accountable for its administration of the South West Africa/Namibia.¹⁵¹⁰ The trusteeship system, enshrined for in Chapter XII of the Charter, takes over from the mandate system of the League of Nations. Article 76 provides for the duties of the administering authority to promote self-government, self-determination and protect human rights and fundamental freedoms. No trusteeship exists at the moment.¹⁵¹¹

Second, the International Labour Organization (ILO) was created in 1919 as an affiliate of the League of Nations. Carrying the mandate to work towards the amelioration of working conditions of employees worldwide,¹⁵¹² the ILO assisted the League in developing human rights, especially those related to labour rights. For instance, the ILO and the League of Nations played a historic part in the abolition of slavery and forced labour.

2. The Charter of the United Nations

The commitment to the protection human rights and fundamental freedoms was institutionalized with the creation of the

¹⁵⁰⁸ Brownlie op cit 571.

¹⁵⁰⁹ I.C.J. Reports (1950) 128, 132.

¹⁵¹⁰ Brownlie op cit 571.

¹⁵¹¹ *ibid.*

¹⁵¹² Y. Dahan, H. Lerner, and F. Milman-Sivan, 'Shared Responsibility and the International Labour Organization' (2013) 34 Michigan Journal of International Law 675.

Organization of the United Nations (UN) in 1945.¹⁵¹³ The UN itself became a central vehicle for the codification of human rights norms.¹⁵¹⁴ To be sure, the General Assembly of the UN has adopted no less than 30 human rights treaties.¹⁵¹⁵

As I indicated earlier in this chapter, the UN Charter stands out from other international human rights instruments because of its comprehensive scope. While pre-Charter human rights law were only confined to certain categories of human rights, the UN Charter has no limits as to which human rights it covers.¹⁵¹⁶

The UN Charter provides for two fundamental principles, namely¹⁵¹⁷

1. the promotion and protection of human rights and fundamental freedoms without distinction among individuals; and
2. the pledge by UN member states to take joint and separate action to protect human rights and fundamental freedoms, as set out in Article 55 of the Charter.

Those two principles set the foundation of modern international human rights law.¹⁵¹⁸

The UN Charter contained already in its preamble and in the text itself of the Charter several provisions affirming and recognizing human rights. Those provisions include:

- Article 1, on the purposes of the UN to, among others, promote and encourage human rights;
- Article 13, on studies and recommendations by the UN for the promotion of human rights; and
- Article 55, on the obligation of the UN and its member states to promote human rights.

¹⁵¹³ D. Coates, *The Oxford Companion to American Politics* (Oxford University Press 2012) 506.

¹⁵¹⁴ See B. Keys and R.O. Burke, 'Human Rights' in R. H. Immerman and P. Goedde (eds), *The Oxford Handbook of the Cold War* (Oxford University Press 2013) 486. See also *Internet Encyclopaedia of Philosophy* op cit.

¹⁵¹⁵ Janis op cit 268.

¹⁵¹⁶ Buergenthal and Murphy op cit 136.

¹⁵¹⁷ *ibid* 136-137.

¹⁵¹⁸ *ibid* 137.

The human rights provisions in the UN Charter suffer from a number of shortcomings. Dugard has pointed out a few of those shortcomings.¹⁵¹⁹ First, he said that those vague human rights do not indicate which specific human right they protect. Second, the Charter contains no mechanism for the enforcement of human rights. Third, human rights provisions apparently clash with Article 2(4), which stops member states from intervening in the domestic affairs of other member states.¹⁵²⁰ If some sections of the population rises up in arms against the government and the government cracks down on them with deadly force, as it happened in Libya in 2011, should the UN refrain from interfering with those ‘domestic’ affairs or should it rather chip in to protect the human rights of the people persecuted by the state? At what point precisely does a crisis move from a domestic matter to a concern for the international community? The international community will sometimes find it hard to draw the line.

3. The international bill of rights

The international bill of rights is to the international community what the Namibian Bill of Rights is to Namibia: It is the central nervous system of the human rights regime. The international bill of rights consists of three documents. These three documents are the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UN produced and adopted all those three documents. Namibia ratified both covenants on 28 November 1994.

In 1946, the Economic and Social Council of the United Nations (ECOSOC) created a Commission on Human Rights. The mission of that Commission consisted in putting in place an international bill of rights.¹⁵²¹ The international bill of rights had to comprise a declaration and a treaty. The Commission formulated the Universal Declaration of Human Rights. It then forwarded the Universal

¹⁵¹⁹ J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 322-323.

¹⁵²⁰ *ibid.*

¹⁵²¹ E. Balabanova, *The Media and Human Rights: The Cosmopolitan Promise* (Routledge 2014) 24.

Declaration of Human Rights to the UN General Assembly.¹⁵²² The General Assembly adopted the Universal Declaration on 10 December 1948. At the time of the adoption of the Universal Declaration of Human Rights, South Africa still occupied South West Africa/Namibia.

3.1. The Universal Declaration of Human Rights

3.1.1 The significance of the Declaration

The Universal Declaration of Human Rights (UDHR) has had a far-reaching impact on the development and promotion of human rights. While the UN Charter provided the basis for the comprehensive development of human rights and fundamental freedoms, it did not define them, let alone list them. Defining and listing human rights and fundamental freedoms, that is exactly what the UDHR achieved,¹⁵²³ and in that achievement lies much of its significance.

The UDHR radiates beyond the international stage in the sense that many of the rights and freedoms that it proclaims inspired the provisions of countless constitutions and constitutional documents across the globe. In particular, the UDHR inspired the Namibian Constitution, especially the Preamble and the provisions of the Bill of Rights enshrined in the Constitution.¹⁵²⁴ Furthermore, the UDHR provides for the first two generations of human rights, namely civil and political rights, and socio-economic rights.

¹⁵²² G.J. Andreopoulos, 'Universal Declaration of Human Rights: 1948' *Encyclopaedia Britannica* <<https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights>> accessed 18 November 2018.

¹⁵²³ Buergenthal and Murphy op cit 137.

¹⁵²⁴ See G.J. Naldi, *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Juta 1995). Also H.G. Geingob, 'Drafting of Namibia's Constitution' in A. Bösl, N. Horn, and A. du Pisani (eds.) *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (Macmillan Education Namibia 2010) 83.

3.1.2 The legal status of the Declaration

A huge debate arose as to the legal status of the Declaration.¹⁵²⁵ Some say that the Declaration has acquired the status of customary international law and,¹⁵²⁶ as such, it binds all states.¹⁵²⁷ In 1968, a proclamation made by states that attended the Conference on Human Rights in Tehran stated that the UDHR forms part of customary international law. The Tehran Conference reviewed the progress with regard to human rights since the UN adopted the UDHR. Others like Dugard¹⁵²⁸ argue that, although some basic principles of the UDHR reflect customary international law, the Declaration as a whole does not form part of customary international law.

The correct position is that the UDHR, as a recommendation of the UN General Assembly, does not bind states, but that some of the principles of the Declaration do because they complied with the requirements for the formation of a rule of customary international law.¹⁵²⁹ Although the UDHR does not bind states in the same way an international treaty binds them, it has nonetheless acquired over the years the status of an authoritative interpretation of human rights and fundamental freedoms.¹⁵³⁰ The principles that hardened into customary international law include non-discrimination and the right to a fair trial.

¹⁵²⁵ J. Nickel, 'Human Rights' *Stanford Encyclopedia of Philosophy* (2014) <<https://plato.stanford.edu/entries/rights-human/>> accessed 18 November 2018.

¹⁵²⁶ Buergenthal and Murphy op cit 137.

¹⁵²⁷ H. Hannum, 'The UDHR in National and International Law' (2014) 3 *Health and Human Rights* 144.

¹⁵²⁸ Dugard op cit 326.

¹⁵²⁹ See M.D. Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 *The European Journal of International Law* 879–906. See also, G. Kerwin, 'The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts' (1983) 32 *Duke Law Journal* 876.

¹⁵³⁰ H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative. Law* 287.

3.2. The two main international human rights covenants

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both relate to the UDHR. The ICCPR specifies the political and civil rights in the UDHR with much greater precision than the UDHR. The ICESCR does the same with regard to economic, social and cultural rights; and amplifies them. Furthermore, both covenants provide the rights and freedoms proclaimed in the UDHR with an unquestionably binding force that the UDHR arguably appears to lack.¹⁵³¹ What is more, both covenants provide for measures for implementing and monitoring human rights – measures that the UDHR does not have.

The initial idea was to produce one multilateral treaty and a declaration. But the Cold War raging at the time meant that the UN divided along ideological lines between the capitalist West and the communist East. For largely ideological reasons, the United States (US) could not recognize the social, economic, and cultural rights as ‘rights’. The initial idea was changed so as to have two international treaties, one providing for civil and political rights; and the other for social, economic and cultural rights.

Most countries, including the US, ratified the ICCPR;¹⁵³² but some, like the US, did not ratify the ICESCR.¹⁵³³ Namibia has ratified both these covenants, which apply automatically in Namibia by virtue of Article 144 of its Constitution.¹⁵³⁴

¹⁵³¹ United for Human Rights, ‘International Human Rights Law: International Bill of Human Rights’ <<http://www.humanrights.com/what-are-human-rights/international-human-rights-law/international-human-rights-law-continued.html>> accessed 18 November 2018.

¹⁵³² K. Ash, ‘U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence’ (2005) 3 *Northwestern Journal of International Human Rights* 1.

¹⁵³³ J. Carter, ‘U.S Finally Ratifies Human Rights Covenant’ *The Christian Science Monitor* (1992) <<https://www.cartercenter.org/news/documents/doc1369.html>> accessed 18 November 2018.

¹⁵³⁴ See F.-X. Bangamwabo, ‘The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework’ in A. Bösl and N. Horn (eds), *Human Rights and the Rule of Law in Namibia* (2nd edn, Macmillan Education Namibia 2009) 165.

3.2.1 The International Covenant on Civil and Political Rights

The UN adopted the International Covenant on Civil and Political Rights (ICCPR) in 1966.¹⁵³⁵ One of its first provisions recognizes the right to self-determination.¹⁵³⁶ Today, many jurists regard the right to self-determination as a third-generation human right, also known as solidarity rights; that is, a right belonging to a 'people'. The civil and political rights protected by the ICCPR include life,¹⁵³⁷ liberty and security of the person,¹⁵³⁸ fair trial,¹⁵³⁹ privacy,¹⁵⁴⁰ family life,¹⁵⁴¹ and non-discrimination.¹⁵⁴² The freedoms protected include movement;¹⁵⁴³ thought, conscience and religion;¹⁵⁴⁴ expression;¹⁵⁴⁵ assembly;¹⁵⁴⁶ and association.¹⁵⁴⁷ Civil and political rights, including those covered in the ICCPR, apply immediately and do not depend on available resources.

The ICCPR created the Human Rights Committee. The Committee monitors how state parties implement the ICCPR. Eighteen experts sit in the Committee. All state parties must submit to the Committee reports on how they implement the rights provided

¹⁵³⁵ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; (1977) U.K.T.S. 6, Cmd. 6702; (1967) 61 A.J.I.L. 870.

¹⁵³⁶ Article 1(1) of the International Convention on Civil and Political Rights, 1966.

¹⁵³⁷ Article 7 of the International Convention on Civil and Political Rights, 1966.

¹⁵³⁸ Article 9 of the International Convention on Civil and Political Rights, 1966.

¹⁵³⁹ Article 14 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴⁰ Article 17 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴¹ Article 23 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴² Article 26 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴³ Article 12 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴⁴ Article 18 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴⁵ Article 19 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴⁶ Article 21 of the International Convention on Civil and Political Rights, 1966.

¹⁵⁴⁷ Article 22 of the International Convention on Civil and Political Rights, 1966.

for in the ICCPR. The Committee has also competence to issue General Comments on how to interpret selected provisions of the ICCPR.¹⁵⁴⁸

The Committee hears individual complaints as well as disputes between states. The First Protocol, the ‘Optional Protocol’, enables the Committee to hear complaints from individuals about the application of the ICCPR.¹⁵⁴⁹

The Committee heard and determined two complaints from individuals residing in Namibia. These complaints are the *Muller* case¹⁵⁵⁰ and the *Diergaardt* case.¹⁵⁵¹ The Committee can only hear such complaints if complainants have exhausted all domestic remedies. The Committee determines individual complaints on the basis of written submissions alone: Complainants may not make oral submissions. After it deliberates, the Committee issues ‘views’ on the matter to the complainant and the respondent state. The ‘views’ of the Committee do not legally bind member states involved in complaints before the Committee.¹⁵⁵² Thus, the determinations of the Committee in the *Muller* case and the Rehoboth Baster case do not bind Namibia legally. The views of the Committee only carry persuasive force.

¹⁵⁴⁸ United Nations Human Rights Office of the High Commissioner, ‘Human Rights Committee’
<<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>>
accessed 18 November 2018.

¹⁵⁴⁹ United Nations Human Rights Office of the High Commissioner, ‘Human Rights Treaty Bodies – Individual Communications’
<<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx>> accessed 18 November 2018.

¹⁵⁵⁰ *Muller and Engelbard v. Namibia*, Communication 919/2000, U.N. Doc. A/57/40, Vol. II, at 243 (HRC 2002). See also C. Mapaire, ‘Decoding the Right to Equality: A Scrutiny of Judiciary Perspicacity over 20 Years of Namibia’s Existence’ (2010) 2 Namibian Law Journal 31-58.

¹⁵⁵¹ *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000).

¹⁵⁵² J.S. Davidson, ‘Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee,’ *New Zealand Law Review*, Vol. 125: 2001, p. 22.

3.2.2 The International Covenant on Economic, Social, and Cultural Rights

Like the ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) was adopted in 1966.¹⁵⁵³ Like the ICCPR, the ICESCR provides for the right to self-determination.¹⁵⁵⁴ The ICESCR differs from the ICCPR in that it deals with second-generation human rights (i.e., socio-economic rights), unlike the ICCPR, which deals with first-generation human rights. The socio-economic rights protected in the ICESCR include work,¹⁵⁵⁵ trade unions,¹⁵⁵⁶ social security,¹⁵⁵⁷ adequate standard of living,¹⁵⁵⁸ health,¹⁵⁵⁹ education,¹⁵⁶⁰ and participation in cultural life.¹⁵⁶¹

Socio-economic rights, including those provided for in the ICESCR, are realisable progressively and subject to available resources. The Namibian Constitution does not provide for justiciable socio-economic rights. Some socio-economic rights are provided for in Chapter 11 of the Constitution, which deals with the 'Principles of State Policy'. No court, however, may enforce the principles of state policy, including the socio-economic rights, in Chapter 11 of the Constitution. The principles merely guide the government in making and applying laws that gives effect to the principles and guide the courts in interpreting any laws based on the principles.¹⁵⁶² In other words, socio-economic rights, and the entire Chapter 11, merely provide guidelines. Since Namibia ratified the

¹⁵⁵³ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3; (1977) U.K.T.S. 6, Cmnd. 6702; (1967) 6 I.L.M. 360.

¹⁵⁵⁴ Article 1(1) of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁵⁵ Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁵⁶ Article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁵⁷ Article 9 of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁵⁸ Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁵⁹ Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁶⁰ Article 13 of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁶¹ Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁵⁶² Article 101 of the Constitution of the Republic of Namibia, 1990.

ICESCR, Article 144 of the Constitution, which makes duly ratified treaties part of Namibian law, make socio-economic rights justiciable in Namibia.¹⁵⁶³

4. Other important human rights treaties

Other examples of principal human rights treaties include the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Protection of All Migrant Workers and Members of their Families, and the Convention on the Rights of Persons With Disabilities. Many other treaties and legal instruments deal with human rights.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁵⁶⁴ prohibits all form of racial discrimination and provides remedies against acts of racial discrimination. It was adopted in 1966. It came into operation three years later, in 1969. Namibia ratified the CERD on 11 November 1982.

The CERD puts a special emphasis on the prohibition of apartheid.¹⁵⁶⁵ To implement the prohibition on racial discrimination, states undertake to guarantee civil and political rights and socio-economic rights.¹⁵⁶⁶ Some experts have objected to the fact that the CERD have extended the prohibition to private individuals and non-state actors.¹⁵⁶⁷

¹⁵⁶³ See also J. Nakuta, 'The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of the Non-Governmental Organisations' in A. Bösl and N. Horn (eds), *Human Rights and the Rule of Law in Namibia* (2nd edn, Macmillan 2009) 89.

¹⁵⁶⁴ Convention on the Elimination of All Forms of Racial Discrimination, 60 U.N.T.S. 195; (1966) 60 A.J.I.L. 650; (1966) 5 I.L.M. 352.

¹⁵⁶⁵ Article 2 of the Convention on the Elimination of all Forms of Racial Discrimination, 1966.

¹⁵⁶⁶ Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination, 1966.

¹⁵⁶⁷ See Human Rights Watch, *Discrimination, Inequality, and Poverty—A Human Rights Perspective* (Human Rights Watch 2013) <<https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective>> accessed 19 November 2018.

The Committee for the Elimination of Racial Discrimination is the body monitors how state parties implement the CERD. In terms of composition, organization and functioning, that Committee resembles the Human Rights Committee established by the ICCPR.

The UN passed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979.¹⁵⁶⁸ The CEDAW came into force in 1981; Namibia ratified it on 23 November 1982. The CEDAW obliges all states to prohibit any form of discrimination against women in all spheres of life. The Convention admits no reservation that defeats its object and purpose.¹⁵⁶⁹

Namibia also ratified the Convention on the Rights of the Child (CRC)¹⁵⁷⁰ on 30 September 1990, and the Convention on the Rights of Persons With Disabilities¹⁵⁷¹ on 4 December 2007.

5. International human rights bodies

Perhaps, the most crucial element of international human rights relates to their practical application. Passing well-crafted international human treaties marks a good start, but implementing those treaties at the domestic level is another pair of sleeve, if not the hardest aspect of the international human rights regime. In addition to the Human Rights Committee mentioned above, other treaty bodies occupy a central place in monitoring how states apply or domesticate the international treaties they have ratified.

5.1 The Human Rights Council

Prominent international human rights bodies include the Human Rights Council and the Office of the UN High Commissioner for Human Rights. In 2006, the UN General Assembly replaced the UN

¹⁵⁶⁸ Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13; (1980) 19 I.L.M. 33.

¹⁵⁶⁹ Article 28(2) of the Convention on the Elimination of All Forms of Discrimination against Women, 1979.

¹⁵⁷⁰ Convention on the Rights of the Child, 1577 U.N.T.S. 3; (1989) 28 I.L.M. 1448.

¹⁵⁷¹ Convention on the Rights of Persons with Disabilities, A/61/611; (2008) 15 I.H.R.R. 255.

Commission on Human Rights with the Human Rights Council.¹⁵⁷² The Human Rights Council is a subsidiary body of the General Assembly. The UN General Assembly elects its 47 members, representing various regions of the world.¹⁵⁷³ It elects each member of the Council by simple majority for a term of three years.¹⁵⁷⁴

The Council meets several times a year for sessions lasting several weeks. It appoints special rapporteurs for specific countries and themes, known as country Special Rapporteur and thematic Special Rapporteur, respectively. The Council is admittedly a very much politicized human rights body.¹⁵⁷⁵ Politicization led to the demise of the Council's predecessor, the UN Commission on Human Rights.¹⁵⁷⁶ Like its predecessor, the Human Rights Council suffers from the same politics as the same diplomats and the same practice of bloc-voting based on regional interests also define the Council.¹⁵⁷⁷

5.2 The Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (OHCHR) forms part of the secretariat of the UN. It is headquartered in Geneva, Switzerland and headed by the High Commissioner for Human Rights.¹⁵⁷⁸ The UN created the position of High Commissioner for Human Rights in 1993. The High Commissioner holds arguably the most powerful position in terms of international human rights. In its work, the High Commissioner works with governments, non-governmental organizations (NGOs), national human rights institutions, regional and international organizations, and civil society.¹⁵⁷⁹

¹⁵⁷² A/Res/60/251, U.N. G.A.O.R., 60th Sess., U.N. Doc.A/60/L.48 (3 April 2006) [1].

¹⁵⁷³ *ibid* [7].

¹⁵⁷⁴ *ibid*.

¹⁵⁷⁵ R. Freedman, 'The United Nations Human Rights Council: More of the Same?' (2013) 31 *Wisconsin International Law Journal* 208.

¹⁵⁷⁶ K. Boyle, 'The United Nations Human Rights Council: Origins, Antecedents, and Prospects' in K. Boyle (ed), *New Institutions for Human Rights Protection* (Oxford University Press 2009) 12-46.

¹⁵⁷⁷ D. Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 544-545.

¹⁵⁷⁸ A/Res/60/251, U.N. G.A.O.R., 60th Sess., U.N. Doc.A/60/L.48 (3 April 2006) [1].

¹⁵⁷⁹ *ibid* [11].

6. Regional human rights systems

The globe's various regions have come up with human rights instruments. These include the European Convention on Human Rights, the American Convention of Human Rights, and the African Charter on Human and Peoples' Rights.¹⁵⁸⁰ Each one of these regional human rights treaties is administered by a regional human rights system. The European system and the jurisprudence based on the European Convention on Human Rights have proved comparatively effective. They have inspired several countries and other regional human rights protection systems, including the African system.¹⁵⁸¹ In a similar vein, Namibian courts have in many human rights cases relied on jurisprudence from the European human rights protection system. In *Tcoeib*, the Supreme Court of Namibia looked to European human rights jurisprudence when pondering the question whether the Namibian Constitution permits life imprisonment.¹⁵⁸²

7. The African human rights protection system

The African human rights protection system stands on three core institutions, namely the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and the African Court of Justice and Human Rights.

7.1 The African Charter on Human and Peoples' Rights

The key legal instrument of the African human rights protection system is the African Charter on Human and Peoples' Rights, also known as the Banjul Charter. The Organization of African Unity (today the African Union) adopted Banjul Charter adopted in 1981

¹⁵⁸⁰ See C. Heyns, D. Padilla, and L. Zwaak, 'Schematic Comparison of Regional Human Rights Systems: An Update' (2006) 3 SUR – Revista Internacional de Derechos Humanos 163. See also N.J. Udombana, 'The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa' (2006) 6 African Human Rights Law Journal 298.

¹⁵⁸¹ M.W. Mutua, 'The African Human Rights System: A Critical Evaluation' (2000) Human Development Occasional Papers HDOCPA-2000-15.

¹⁵⁸² *S v Tcoeib* 1999 NR 24 (SC).

in Banjul, the capital city of the Gambia. The Banjul Charter came into force in 1986. Namibia ratified the Charter on 30 July 1992.¹⁵⁸³

The Banjul Charter drew inspiration from other regional human rights instruments.¹⁵⁸⁴ However, the Banjul Charter reflects the unique African perspectives on human rights. The Preamble of the Charter refers to “the virtues of [Africa’s] historical tradition and the values of African civilization.”

The uniqueness of the African conception of human rights is reflected by including duties of citizens in the Charter.¹⁵⁸⁵ The Charter recognizes first-generation human rights (i.e., civil and political rights) and second-generation human rights (i.e., social, economic and cultural rights). Another distinctive trait of the Charter: It also recognizes third-generation human rights, the so-called group or solidarity rights.

The Charter protects many civil and political rights, including equality,¹⁵⁸⁶ life and integrity of the person,¹⁵⁸⁷ and freedom of conscience and religion.¹⁵⁸⁸ The Charter does not contain any general derogation clause. Instead, rights provided for in the Charter are limited by internal limitation clauses, called ‘claw-back clauses’.¹⁵⁸⁹

The Charter enshrines many socio-economic rights, including property,¹⁵⁹⁰ work and equal pay,¹⁵⁹¹ health,¹⁵⁹² and education.¹⁵⁹³ The Charter does not provide for certain socio-economic rights, for

¹⁵⁸³ See African Commission on Human and People’s Rights, ‘Ratification Table: African Charter on Human and Peoples’ Rights’ <<http://www.achpr.org/instruments/achpr/ratification/>> accessed 19 November 2018.

¹⁵⁸⁴ S.B. Keetharuth, ‘Major African Legal Instruments’ in A. Bösl and J. Diescho (eds), *Human Rights in Africa: Legal Perspectives on Their Protection and Promotion* (Macmillan Education Namibia 2009).

¹⁵⁸⁵ M.W. Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35 *Virginia Journal of International Law* 339.

¹⁵⁸⁶ Article 3 of the African Charter on Human and Peoples’ Rights, 1981.

¹⁵⁸⁷ Article 4 of the African Charter on Human and Peoples’ Rights, 1981.

¹⁵⁸⁸ Article 8 of the African Charter on Human and Peoples’ Rights, 1981.

¹⁵⁸⁹ C. Heyns and M. Kilander, ‘The African Regional Human Rights System’ in F.G. Isa and K. de Feyter (eds), *International Protection of Human Rights: Achievements and Challenges* (Universidad de Deusto 2006) 519.

¹⁵⁹⁰ Article 14 of the African Charter on Human and Peoples’ Rights, 1981.

¹⁵⁹¹ Article 15 of the African Charter on Human and Peoples’ Rights, 1981.

¹⁵⁹² Article 16 of the African Charter on Human and Peoples’ Rights, 1981.

¹⁵⁹³ Article 17 of the African Charter on Human and Peoples’ Rights, 1981.

instance, food, housing, and social security. The African Commission on Human and Peoples' Rights has adopted a liberal construction of the existing rights in the Charter so as to infer from the existence of those rights a number of rights that have been left out.¹⁵⁹⁴

The collective or group rights protected in the Charter feature self-determination;¹⁵⁹⁵ the environment;¹⁵⁹⁶ and economic, social, and cultural development.¹⁵⁹⁷ The Charter does not define 'people' in its reference to 'peoples' rights'. The African Commission on Human and Peoples' Rights in the *Katangese People* case¹⁵⁹⁸ suggests that it matters less what a 'people' is than what the individuals forming that 'people' claim. In other words, the claims of groups matter more than what those groups call themselves.

7.2 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights monitors the way member states implements the Charter. Its headquarters sit in Banjul, Gambia, where the Organization of African Unity (OAU) adopted the African Charter on Human and Peoples' Rights.¹⁵⁹⁹ Ironically, until the Economic Community of West African States (ECOWAS) pressured President Yahya Jammeh to relinquish power January 2017 after he lost the presidential elections the previous month, the Gambia was known for its poor human rights record.¹⁶⁰⁰

The Commission has a promotion and protection mandate.¹⁶⁰¹ The mandate to promote human rights¹⁶⁰² empowers the Commission to lay down principles, issue recommendations, run

¹⁵⁹⁴ Dugard op cit 556.

¹⁵⁹⁵ Article 20 of the African Charter on Human and Peoples' Rights, 1981.

¹⁵⁹⁶ Article 24 of the African Charter on Human and Peoples' Rights, 1981.

¹⁵⁹⁷ Article 22 of the African Charter on Human and Peoples' Rights, 1981.

¹⁵⁹⁸ *Katangese Peoples' Congress v Zaire*, Merits, Communication No 75/92, IHRL 174 (ACHPR 1995), October 1995, African Commission on Human and Peoples' Rights [ACHPR].

¹⁵⁹⁹ African Commission on Human and Peoples' Rights. Available at <http://www.achpr.org/>.

¹⁶⁰⁰ N. Hultin and others, 'Autocracy, Migration, and The Gambia's "Unprecedented" 2016 Election' (2017) 116 *African Affairs* 321.

¹⁶⁰¹ See S. Gumede, 'Bringing Communications Before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118.

¹⁶⁰² Article 45(1) of the African Charter on Human and Peoples' Rights, 1981.

seminars, and carry out research. Under its protective mandate, the Commission monitors how member states apply the Charter rights by way of state reports and individual complaints.¹⁶⁰³ Individual complaints include complaints lodged by NGOs.¹⁶⁰⁴ States have a legal duty to submit reports to the Commission every two years. In practice, states have not been consistent in submitting reports to the Commission. This state practice is worsened by the fact that the Commission does not have any effective follow-up mechanism.¹⁶⁰⁵

The Commission receives communications from individuals and NGOs in which they make certain allegations that a named state has violated the rights provided for in the Banjul Charter.¹⁶⁰⁶ It then informs the defendant state about the allegations. It sends a copy to the defendant state so that it can issue comments on the admissibility of the claims or allegations. It proceeds by considering the admissibility of individual claims before considering the merits of those claims. In that sense, the Commission functions almost like a real court. So far, the Commission has not received any claim or allegation concerning Namibia.

In terms of Article 58 of the Charter, the Commission can undertake investigations regarding human rights violations. Similar to the UN Human Rights Council, it can appoint thematic special rapporteurs to address certain human rights themes, such as refugees, prisoners, etc.

The African Commission has claimed that its recommendations have binding force vis-à-vis member states. It has even passed in 2006 a Resolution on the Importance of Implementation of the Recommendations of the African Commission, which stipulates that

¹⁶⁰³ Article 62 of the African Charter on Human and Peoples' Rights, 1981 (providing for state reports); and Article 5(3), read with Articles 2 and 34(6), of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

¹⁶⁰⁴ M.P. Pedersen, 'Standing and the African Commission on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 407.

¹⁶⁰⁵ See G.W. Mugwanya, 'Examination of State Reports by the African Commission: A Critical Appraisal' (2001) 1 African Human Rights Law Journal 268.

¹⁶⁰⁶ See Gumedze op cit. See also M. Hansungule, 'African courts and the African Commission on Human and Peoples' Rights' in A. Bösl and J. Diescho (eds), *Human Rights in Africa: Legal Perspectives on Their Protection and Promotion* (Macmillan Education Namibia 2009) 233.

the Commission's recommendations bind member states legally.¹⁶⁰⁷ States have, however, not been consistent in applying the Recommendations of the Commission. They often ignore the Commission's Recommendations. Whatever the true position may be, the Charter does not expressly declare that the recommendations of the Commission have binding force.¹⁶⁰⁸

7.3 The African Court on Human and Peoples' Rights

Based in Arusha, Tanzania, the African Court of Human and Peoples' Rights '*complements*' the protective mandate of the African Commission on Human and Peoples' Rights.¹⁶⁰⁹ A protocol to the African Charter on Human and Peoples' Rights establishes the African Court on Human and Peoples' Rights. Eleven judges sit on that Court.¹⁶¹⁰ The AU Assembly elects judges by simple ballot in their capacity as judges for a term of six years.¹⁶¹¹ The first judges of the Court were elected in Khartoum, Sudan, in January 2006.¹⁶¹²

The Court has competence to decide all cases concerning the interpretation and application of human rights instruments in Africa, especially the Banjul Charter.¹⁶¹³ The Court is empowered to hand

¹⁶⁰⁷ African Commission on Human and Peoples' Rights, '97: Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties' <<http://www.achpr.org/sessions/40th/resolutions/97/>> accessed 19 November 2018.

¹⁶⁰⁸ G.M. Musila, 'The Right to an Effective Remedy Under the African Charter on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 441.

¹⁶⁰⁹ Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

¹⁶¹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998. The Protocol came into force on 25 January 2004.

¹⁶¹¹ Articles 14(1) (providing for the elections of judges) and 15(1)(providing for the judges' terms of office) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

¹⁶¹² African Court on Human and Peoples' Rights, 'Welcome to the Court' <<http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court>> accessed 19 November 2018.

¹⁶¹³ *ibid.*

down binding and final decisions.¹⁶¹⁴ The states parties and the African Commission on Human and Peoples' Rights may bring claims before the Court. In exceptional cases, individuals and NGOs may be permitted to refer matters to the Court.¹⁶¹⁵

Before it can hear a matter brought by individuals or NGOs, the Court must comply with two requirements. The first requirement is that the Court must determine whether a state party involved in the dispute has made a declaration in terms of article 34(6) of the Protocol. Article 34(6) provides that a state party involved in dispute must have allowed individuals or NGOs to bring claims against it before the Court.

The second condition relates to the Court's obligation to exercise its jurisdiction to hear the dispute.¹⁶¹⁶ In practice, the Court can hear an individual complaint after the African Commission on Human and Peoples' Rights has made a decision or issued a report on that complaint. Article 34(6) makes it harder for the Court hear many complaints brought before the Court directly by individuals or NGOs because member states would not rush or prefer to make a declaration in terms of which individuals and NGOs can bring an action against them before an international court. However, the Court managed to finalize a decent number of cases. As of September 2018, the Court has heard and finalized 56 cases.¹⁶¹⁷

In 2009, the Court made a decision in *Yogogombaye v The Republic of Senegal*,¹⁶¹⁸ a matter in which a Chadian national living in Switzerland unsuccessfully requested the suspension of the trial of Chadian dictator Hissène Habré. The *Yogogombaye* represents the very

¹⁶¹⁴ Articles 28(2) (providing for the finality of the Court's judgments) and 30 (imposing a duty on member states to comply with the Court's judgments) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

¹⁶¹⁵ See G.J. Naldi, 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 African Human Rights Law Journal 367. See also Pedersen *op cit*.

¹⁶¹⁶ R.W. Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 African Human Rights Law Journal 223.

¹⁶¹⁷ African Court on Human and Peoples' Rights, 'Finalised Cases' <<http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases>> accessed 19 November 2018.

¹⁶¹⁸ *Michelot Yogogombaye v. Senegal*, Application No. 001/2008, African Court on Human and Peoples' Rights, Judgment (15 December 2009).

first case that the Court finalized.¹⁶¹⁹ In 2011, the Court handed down a decision in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*.¹⁶²⁰ That matter involved a provisional order made by the Court in terms of which Libya had to refrain from any action that could result in the loss of life during the civil strife that broke out in 2011 in Libya.

7.4 The African Court of Justice and Human Rights

The African Union (AU) has decided to merge the African Court of Human and Peoples' Rights with the African Court of Justice and Human Rights.¹⁶²¹ The AU Assembly of Heads of State and Government decided on the merger in 2008, when it adopted a Protocol on the Statute of the African Court of Justice and Human Rights. That Protocol supersedes all existing protocols establishing both the African Court of Justice and the African Court of Human and Peoples' Rights.¹⁶²² The merger of the two courts will become effective and the merged Court will enter into force 30 days after 15 states ratified the Protocol on the Statute of the African Court of Justice and Human Rights.¹⁶²³

The African Court of Justice and Human Rights serves as the main judicial organ of the African Union.¹⁶²⁴ It will deal with all matters concerning the interpretation and application of legal instruments of the AU, not just human rights instruments or matters.¹⁶²⁵ Like the African Court of Human and Peoples' Rights,

¹⁶¹⁹ See African Court on Human and Peoples' Rights, 'Finalised Cases' <<http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases>> accessed 19 November 2018.

¹⁶²⁰ *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Application No. 004/2011, African Court on Human and Peoples' Rights, Judgment, 25 March 2011.

¹⁶²¹ Articles 1-3 of the Protocol on the Statute of the African Court of Justice and Human Rights, 2008. See M. Hansungule op cit.

¹⁶²² Article 1 of the Protocol on the Statute of the African Court of Justice and Human Rights, 2008.

¹⁶²³ Hansungule op cit.

¹⁶²⁴ African Union, 'Judicial and Human Rights Institutions' <<https://au.int/en/organs/cj>> accessed 19 November 2018.

¹⁶²⁵ Article 28 of the Statute of the African Court of Justice and Human Rights, 2008.

the African Court of Justice and Human Rights will have its seat in Arusha, Tanzania.¹⁶²⁶

The states parties to the Court's Protocol, the Assembly, the Parliament and authorized organs of the AU will be able to bring matters before the Court.¹⁶²⁷ Individuals and NGOs will also be able to institute actions if the dispute involves human rights ratified by the member states concerned.¹⁶²⁸

The Court has the power to issue binding and final decisions.¹⁶²⁹ The Executive Council of the AU monitors how member states comply with the Court's decisions.¹⁶³⁰ Should a state fail to comply with a decision of the Court, the Court may refer the matter to the Assembly of Heads of State and Government.¹⁶³¹ The Assembly can then decide on the measures, including sanctions, to impose in order to secure compliance with the Court's decision.¹⁶³²

8. Human rights in Namibian law

Human rights enshrined in duly ratified international treaties apply in Namibia by virtue of Article 144 of the Constitution. What is more, the 1990 Namibian Constitution contains its own catalogue of human rights. Chapter 3 of the Constitution, the so-called Bill of Rights, enshrines human rights and fundamental freedoms. The Bill of Rights provides mostly for civil and political rights. Social, economic and cultural rights appear to a much lesser extent, while people's rights are almost absent from the Constitution, except as

¹⁶²⁶ Article 25 of the Statute of the African Court of Justice and Human Rights, 2008.

¹⁶²⁷ Article 29 of the Statute of the African Court of Justice and Human Rights, 2008.

¹⁶²⁸ Article 30 of the Statute of the African Court of Justice and Human Rights, 2008.

¹⁶²⁹ Article 46 of the Statute of the African Court of Justice and Human Rights, 2008.

¹⁶³⁰ Article 43(6) of the Statute of the African Court of Justice and Human Rights, 2008.

¹⁶³¹ Article 46(4) of the Statute of the African Court of Justice and Human Rights, 2008.

¹⁶³² Article 46(5) of the Statute of the African Court of Justice and Human Rights, 2008.

principles of state policy in Chapter 11, which do not bind the state in Namibia.¹⁶³³

Namibian courts have decided a number of cases dealing with human rights.¹⁶³⁴ In *Namundjepo*, the question the High Court of Namibia had to settle was whether putting prisoners in chain offends Article 8 (dignity) of the Namibian Constitution.¹⁶³⁵ The Court answered in the affirmative. The same court ruled in *Julius v Commanding Officer, Windhoek Prison* that a prison sentence for failure to pay a judgment debt violated the right to personal liberty, protected by Article 7 of the Constitution.¹⁶³⁶ *Fantasy Enterprises CC t/a Hustler The Shop v The Ministry of Home Affairs* also dealt with human rights.¹⁶³⁷ The police confiscated magazines and videos at the applicant's sex shop. The police argued that the sale of those items contravened the Combating of Immoral Practices Act. The applicants approached the High Court and maintained that the police infringed their right to freedom of speech. The court ruled that the impugned provision of the Combating of Immoral Practices Act was too broad and vague. Thus, it violated the applicant's freedom of speech and freedom to carry on any trade or business.

9. Critique of the human rights movement

Many scholars criticize the human rights movement for various reasons. In this respect, Kennedy's study offers a good starting point and framework for discussion.¹⁶³⁸ First, human rights occupy or

¹⁶³³ Article 101 of the Constitution of the Republic of Namibia, 1990.

¹⁶³⁴ For example, *Müller v The President of the Republic of Namibia and Another* 1999 NR 190 (SC); *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC); *S v Kau and Others* 1995 NR 1 (SC); *Ex Parte Attorney-General: In Re Corporal Punishment by Organs Of State* 1991 NR 178 (SC); *Frans v Paschke and Others* 2007 (2) NR 520 (HC); *Ex parte: Chingufo, In re: Semente v Chingufo* 2013 (2) NR 328 (HC).

¹⁶³⁵ *Namundjepo and Others v Commanding Officer, Windhoek Prison and Another* (SA 3/98) [1999] NASC 3; 2000 (6) BCLR 671 (NmS) (9 July 1999).

¹⁶³⁶ *Julius v Commanding Officer, Windhoek Prison and Others; Nel v Commanding Officer, Windhoek Prison and Others* 1996 NR 390 (HC).

¹⁶³⁷ *Fantasy Enterprises CC t/a Hustler the Shop v Minister of Home Affairs and another; Nasilowski and others v Minister of Justice and others* 1998 NR 96.

¹⁶³⁸ D. Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 107 (observing that the criticisms that he lists are not unknown, that the criticisms have been around for a

crowd out the field of emancipatory possibility.¹⁶³⁹ Here, the claim is that the human rights discourse dominates imaginative space so much that it ignores or neglects alternative strategies to secure rights and interests. Human rights – so the claim also goes – delegitimize alternative strategies. Likewise, because the discourse expects emancipatory projects to be expressed in the vocabulary of ‘rights’, good policies not expressed in that manner go unattended.¹⁶⁴⁰

Second, human rights view the problem and the solution too narrowly.¹⁶⁴¹ This shortcoming of the human rights movement manifests in more than one way. For instance, focus on violations of rights by government has led to the neglect of abuses by non-governmental actors and private parties. This narrow focus also loses sight of the economy and its role in the protection of rights, especially questions of distributive justice.

Third, human rights generalize too much.¹⁶⁴² They promote abstract, universalistic ideas of people, society, and good and evil, at the expense of diversity, cultural and otherwise. Fourth, human rights particularize too much.¹⁶⁴³ They over-emphasize the individual and the ‘right-holding identity’.¹⁶⁴⁴ They also encourage conflicts at the detriment of politics and negotiations. And, while deeply suspicious of the state, the human rights movement strengthens the state by placing it at the centre of the emancipatory promise.

Moreover, human rights express the ideology, ethics, aesthetic sensibility and political practice of a particular Western 18th-through-20th century liberalism.¹⁶⁴⁵ Sixth, human rights promise more than they can deliver.¹⁶⁴⁶ They promise a way of knowing and telling right from wrong, just from unjust, victim from violator, harm from remedy. They promise neutrality from the international community.

long time, and that the human rights movements have responded to them in different ways).

¹⁶³⁹ *ibid* 108-109.

¹⁶⁴⁰ *ibid.*

¹⁶⁴¹ *ibid* 109-110.

¹⁶⁴² *ibid* 111-112.

¹⁶⁴³ *ibid* 112-114.

¹⁶⁴⁴ *ibid.*

¹⁶⁴⁵ *ibid* 114-116.

¹⁶⁴⁶ *ibid* 116-118.

In particular, they promise emancipation. In many instances, human rights cannot deliver those goods.

Lastly, the legal regime of ‘human rights’, taken as a whole, does more to produce and excuse violations than to prevent and remedy them.¹⁶⁴⁷ This consequence ensues, for instance, when human rights treats ‘symptoms’ rather than the ‘illness’.¹⁶⁴⁸

[h]uman rights remedies, even when successful, treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself.

Another facet of this shortcoming relates to the human rights bureaucracy itself. That bureaucracy has some drawbacks. It professionalizes the humanitarian impulse.¹⁶⁴⁹ It fakes solidarity and degrades the legal profession by its heavy reliance of formal texts.

Last but not least, Mutua regrets, in view of recent developments in the human rights field, that the world may have grown cynical and insensitive to serious, systematic and large-scale human rights violations.¹⁶⁵⁰ The daily tragedies in Syria and Yemen quickly come to mind. Mutua recommends a new moral language to fill the void left by human rights.

¹⁶⁴⁷ *ibid* 118-119.

¹⁶⁴⁸ *ibid* 118.

¹⁶⁴⁹ *ibid* 119-120.

¹⁶⁵⁰ M.W. Mutua, ‘Is the Age of Human Rights Over?’ in S.A. McClennen and A.S. Moore (eds), *Routledge Companion to Literature and Human Rights* (Routledge 2016) 450.

ECONOMIC RELATIONS AND SACU

As you will see in this chapter, very few areas of international law – and law in general – affect the well-being of Namibians and entire nations as much as international trade and investment. Economic relations help states fulfil human rights, and not only those of the socio-economic sort.

Economic relations also take the lion's share of activities in international law. According to John Jackson, most of international law consists of economic relations.¹⁶⁵¹ The realm of international economic relations dominates international affairs.¹⁶⁵² In addition, economic relations contribute to national economic development, one of the end purposes of modern international law.¹⁶⁵³

The law on international economic relations includes, depending on the classification used:

1. trade (i.e., the regulation of trans-border movement of goods and services);
2. investment (i.e., the regulation of trans-border movement of capital for profit);
3. business (i.e., the regulation of merchants' international contracts);
4. competition;
5. finance;
6. taxation; and
7. commercial arbitration.

The legal regime regulating international trade and investment in Namibia may easily overwhelm you because of its complexity, entailing as it does some overlapping obligations. Namibia belongs

¹⁶⁵¹ J.H. Jackson, 'Reflecting on International Economic Law' (1996) 17 University of Pennsylvania Journal of International Economic Law 17, 18.

¹⁶⁵² M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen 2003) 295.

¹⁶⁵³ E.T. Jouannet, *A Short Introduction to International Law* (Cambridge University Press 2014) 36.

to several regional economic communities at the same time, namely the Southern African Customs Union (SACU), the Southern African Development Community (SADC), and the Common Market for Eastern and Southern Africa (COMESA). The treaties establishing these economic communities all have provisions and chapters on trade and investment. This multiple membership thus implies that Namibia's obligations under SACU, SADC and COMESA are redundant, if not conflicting, and costly. And, since states write and adopt national laws with their own economic, social and political interests in mind, it is common for those national laws to conflict with the interests of other states when the states that drafted those laws apply them to international economic transactions.¹⁶⁵⁴

1. Namibia's policy framework for international economic relations

As Janis points out, states have long used their laws to affect the natural course of international trade.¹⁶⁵⁵ States ratify treaties and international agreements to direct trade and investment flows. And, Article 144 of the Namibian Constitution, which makes treaties and international agreements part of Namibian law, highlights the significance of treaties Namibia ratified in the fields of trade and investment. To be sure, the Southern African Customs Union (SACU) accounts for the largest share of government revenue in Namibia. (I discuss SACU later in this chapter.)

The overarching policy of the Namibian state actively promotes and maintains the welfare of its people,¹⁶⁵⁶ "a life of human dignity for all Namibians".¹⁶⁵⁷ In pursuing that primary goal, Namibia's policies also aim to encourage foreign investments¹⁶⁵⁸ and act in

¹⁶⁵⁴ Janis op cit 296.

¹⁶⁵⁵ Janis op cit 295.

¹⁶⁵⁶ Article 95 of the Constitution of the Republic of Namibia, 1990.

¹⁶⁵⁷ Article 98(1) of the Constitution of the Republic of Namibia, 1990: "The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians."

¹⁶⁵⁸ Article 99 of the Constitution of the Republic of Namibia, 1990.

accordance with the recommendations and conventions of the International Labour Organisation.¹⁶⁵⁹

Certainly realizing the importance of international economic relations for Namibia, Hidipo Hamutenya, who then served as Minister of Foreign Affairs, popularized in Namibia the term ‘economic diplomacy’, reflecting the greater focus put on international economic relations in diplomacy and foreign affairs by the Ministry under his leadership. Under the umbrella of economic diplomacy, Namibia has chosen an outward-looking strategy for economic growth and development, with export promotion as a central element of that strategy.¹⁶⁶⁰ Economic diplomacy assumes that rapid export growth will create jobs and boost foreign exchange earnings.¹⁶⁶¹

2. Trade

David Ricardo is a highly influential classical economist who lived in the late 18th to 19th centuries and developed the theory of ‘comparative advantage’, which remains today the main explanation for why nations (should) trade with one another. According to this theory,¹⁶⁶² countries should concentrate on producing and then

¹⁶⁵⁹ Article 95(d) of the Constitution of the Republic of Namibia, 1990.

¹⁶⁶⁰ Republic of Namibia, *Namibia's Policy on International Relations and Cooperation* (Republic of Namibia 2017) 29.

¹⁶⁶¹ *ibid.*

¹⁶⁶² See, e.g., H.-J. Chang, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury 2008) ch 3 (criticizing the theory of comparative advantage); and H.-J. Chang, *23 Things They Don't Tell You about Capitalism* (Bloomsbury Press 2011) 125-129 (showing how South Korea prospered by largely ignoring what the theory of comparative advantage prescribed in terms of industrial policies).

selling the goods that they can produce at a lower ‘opportunity cost’¹⁶⁶³ than the opportunity cost of its trading partner.¹⁶⁶⁴

Two legal tools are indispensable to international trade: tariffs and quotas. Tariffs stand out as the most fundamental sort of national law governing international trade.¹⁶⁶⁵ A ‘tariff’ refers to a levy payable to the state at the place of import of a foreign good.¹⁶⁶⁶ In short, a tariff works like a tax. While tariffs increase the revenue of the importing state (i.e., their traditional justification), they also increase the cost of foreign products to consumers, thereby boosting the sales of competing domestic products (i.e., the modern justification of tariffs).¹⁶⁶⁷ If not well designed and used, tariffs can hurt consumers and entire sectors of the national economy. For that reason, states have often resorted to international law to prevent protectionist measures from hurting their domestic economies.

Since Independence in 1990, Namibia has sought to diversify its exports and trade partners. It diversified its partners to other Southern African countries within the SADC region and to high-income markets in Europe, North America, and Asia (especially China).¹⁶⁶⁸ Nonetheless, the country has not succeeded in diversifying the range of its exports.¹⁶⁶⁹ To date, Namibia’s trade remains focused on the export of minerals.

From a Southern African perspective, the principal legal arrangements in the area of international trade feature the World

¹⁶⁶³ ‘Opportunity cost’ refers to what a person gives up to do what he or she does, what a person gives up in order to do something else or something else. Put another way, it refers the benefits he or she could have received by taking an alternative action. Opportunity cost is thus the real cost of an item or conduct. For instance, the opportunity cost of attending this International Law module is the activity you could have carried out if you did not attend the module, such as working in your office, selling goods at your shop, playing with your kids, or watching television at home.

¹⁶⁶⁴ See D. Ricardo, *On the Principles of Political Economy and Taxation* (John Murray, Albemarle-Street 1821).

¹⁶⁶⁵ Janis op cit 301.

¹⁶⁶⁶ *ibid.*

¹⁶⁶⁷ *ibid.*

¹⁶⁶⁸ R. Sherbourne, *A Guide to the Namibian Economy 2017* (Institute for Public Policy Research 2016) 479.

¹⁶⁶⁹ *ibid.*

Trade Organization,¹⁶⁷⁰ the Cotonou Agreement,¹⁶⁷¹ the Southern African Customs Union (SACU),¹⁶⁷² the Common Monetary Area,¹⁶⁷³ the Southern African Development Community (SADC),¹⁶⁷⁴ and the EU/SADC Economic Partnership Agreement.¹⁶⁷⁵ The African Continental Free Trade Area Agreement (AfCFTA) promises to generate considerable trade and investments in Africa. The African Union held an extraordinary summit on the AfCFTA from the 17th to the 21st March 2018 in Kigali, Rwanda. As of August 2018, only six states have ratified the AfCFTA. That continent-wide trade deal requires 22 ratifications to enter into force.¹⁶⁷⁶

2.1 The World Trade Organization

a) Overview

The Marrakesh Agreement established the World Trade Organization (WTO). The Agreement replaced the 1947 General Agreement on Tariffs and Trade (GATT), the treaty underpinning the international trading system before the advent of the WTO. The GATT served as the fall-back plan after the Havana Charter establishing the International Trade Organization (ITO) failed to come into being because it, among other things, could not garner enough votes in the Congress of the United States.

¹⁶⁷⁰ Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154; 33 I.L.M. 1144 (1994).

¹⁶⁷¹ The Cotonou Agreement, June 23, 2000, 41 I.L.M. 767 (2002).

¹⁶⁷² Southern African Customs Union Agreement, 21 October 2002.

¹⁶⁷³ Based on the Multilateral Monetary Agreement, 1992.

¹⁶⁷⁴ Treaty of the Southern African Development Community, 1992, as amended.

¹⁶⁷⁵ Economic Partnership Agreement Between the European Union and Its Member States, of the One Part, and the SADC EPA States, of the Other Part (Consolidated Text), 2016, <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/tradoc_153915.pdf> accessed 8 October 2018.

¹⁶⁷⁶ For more information, see Tralac, 'African Continental Free Trade Area (AfCFTA): Legal Texts and Policy Documents' <<https://www.tralac.org/resources/by-region/cfta.html>> accessed 9 October 2018.

The Marrakesh Agreement came into force on 1 January 1995.¹⁶⁷⁷ Namibia became a member of the WTO on that same date. The WTO has put in place a vast network of rules covering a wide spectrum of fields in international trade. It also came up with an effective dispute settlement system.

The primary object of the WTO consists in providing the common institutional framework for member states to conduct trade relations and negotiations in matters within the scope of the WTO, as set forth in its agreements and legal instruments. In essence, the founders of the WTO designed it as a global institution that opens up markets across the planet so that foreign traders can export their goods and services to those markets. It thus acts as a market-access institution. More specifically, its functions include facilitating the application of WTO legal instruments, providing a forum for negotiations, administering its dispute settlement system and its trade policy review mechanism, and cooperating with the International Monetary Fund and the World Bank Group.¹⁶⁷⁸

b) Organization

The WTO has a complex organization. It has at least five principal organs:

1. the Ministerial Conference,
2. the General Council,
3. three subsidiary councils,
4. the Dispute Settlement Body, and
5. the Trade Policy Review Body.

The highest executive body of the WTO is the Ministerial Conference. The Ministerial Conference comprises the entire membership of the WTO. It comprises ministers responsible for trade from the WTO's entire membership. It normally meets every two year.

¹⁶⁷⁷ P. Babie, *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (The University of Adelaide Press 2014) 252.

¹⁶⁷⁸ Union of International Associations (ed), *Yearbook of International Organizations 2008/2009: Organization Descriptions and Cross-References* (Walter de Gruyter 2008) 2914.

The General Council administers the affairs of the WTO on a day-to-day basis. Like the composition of the Ministerial Conference, the General Council represents all member states of the WTO. The General Council supervises the work of three subsidiary councils, namely the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights.¹⁶⁷⁹ The General Council can be constituted as a Dispute Settlement Body (DSB) or as the Trade Policy Review Body (TPRB). When constituted as the DSB, the Dispute Settlement Understanding (DSU) governs its operations. The DSU provides for the establishment of ad hoc panels and a permanent Appellate Body. Ad hoc panels and the Appellate Body assist the DSB in administering the dispute settlement system of the WTO.¹⁶⁸⁰

The WTO created a secretariat to provide essential support in administering the WTO. A Director-General heads the Secretariat. The current Director-General of the WTO is Roberto Azevêdo, a national of Brazil. On 1 September 2013, he became the sixth Director-General of the WTO, succeeding Pascal Lamy, from France.

The WTO makes decision by consensus,¹⁶⁸¹ except in the DSB where members make decisions by negative consensus.¹⁶⁸² (Consensus is negative when the parties all agree that they will not take a certain decision, for example where the parties agree that they will not adopt the findings of a panel appointed to settle a trade dispute) On the other hand, when members cannot reach consensus, they decide issues by votes.

c) Fundamental principles

Several fundamental principles guide world trade. The following list does not exhaust all the principles guiding the world trading system because of the sheer complexity of international trade law. Fundamental principles of international trade feature non-

¹⁶⁷⁹ D. Steger, *Redesigning the World Trade Organization for the Twenty-first Century* (Wilfred Laurier University Press 2009) 314.

¹⁶⁸⁰ P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2017) 164.

¹⁶⁸¹ Article 2(4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 U.N.T.S. 401.

¹⁶⁸² Articles 6(1), 16(4), 14, and 22(6)-(7) of the DSU, 1994.

discrimination, market access and tariff bindings, and the elimination of quantitative restrictions.¹⁶⁸³

The principle of non-discrimination manifests in the most-favoured nation rule and the national treatment rule.¹⁶⁸⁴ The most-favoured nation rule holds that a state cannot treat a member state more favourably than other member states.¹⁶⁸⁵ Thus, Namibia cannot allow Kenya to export goods to Namibia with little or no custom duties when it requires Germany to pay higher customs duties for the same goods and services exported to Namibia. On the other hand, the national treatment rule holds that a state cannot treat the goods and services imported from a member state less favourably than its own goods and services.¹⁶⁸⁶ This rule means, for example, that within its territory Namibia cannot tax Heineken beer imported from the Netherlands more than it taxes Windhoek Lager.

Market access and tariff bindings relate to the obligation of member state to show the tariffs and conditions that it will apply to goods and services.¹⁶⁸⁷ ‘Schedules of commitments’, or simply ‘schedules’, indicate those tariffs and conditions. Member states accept the basic principle of international trade law that they must abide by their commitments, as expressed in the Schedules, and that they cannot modify them unilaterally. The elimination of quantitative restrictions refers to the obligations of member states not to place quantitative restrictions on imports of goods and services, such as quotas.¹⁶⁸⁸

¹⁶⁸³ M. Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International 2003) 75.

¹⁶⁸⁴ *ibid.*

¹⁶⁸⁵ World Trade Organization, ‘Understanding the WTO: Basics’ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed on 25 July 2017.

¹⁶⁸⁶ *ibid.*

¹⁶⁸⁷ *The Europa World Year Book 2004* (45th edn, Routledge 2004) 344.

¹⁶⁸⁸ J. Tillotson, *Text, Cases and Materials on European Union Law* (4th edn, Cavendish 2003) 248.

d) Namibia's policy towards the WTO

Namibia recognizes that its economic interests and those of other developing countries lie in securing a level playing field in international trade.¹⁶⁸⁹ Developing countries face all manner of protectionist barriers erected by nations in the rich North.¹⁶⁹⁰ Accordingly, Namibia's policy towards the WTO safeguards those economic interests by seeking that levelled playing field.¹⁶⁹¹

Namibia continues its engagement with the WTO negotiation process, especially the conclusion of the remaining Doha mandate.¹⁶⁹² (The Doha Ministerial Conference in 2009 linked, for the first time, issues of trade and development.) It also continues to engage the WTO to defend its rights and obligations under the WTO.¹⁶⁹³

2.2 The Cotonou Agreement

The European Union (EU) and a group of 78 countries from the African, Caribbean, and Pacific (ACP) group entered into a multilateral trade agreement known as the 'Cotonou Agreement'.¹⁶⁹⁴ They adopted the Agreement in Cotonou, Benin, in 2000. The Cotonou Agreement mainly tries to reduce and eventually eradicate poverty, ensure sustainable development, and gradually integrate ACP states into the world economy.

2.3 The Southern African Customs Union

The Southern African Customs Union (SACU) brings together Namibia, Botswana, Lesotho, South Africa and Swaziland in a customs union. It accounts for Namibia's biggest source of revenue.¹⁶⁹⁵ I deal with SACU in greater detail later in this chapter.

¹⁶⁸⁹ Republic of Namibia op cit 57.

¹⁶⁹⁰ *ibid.*

¹⁶⁹¹ *ibid.*

¹⁶⁹² *ibid.*

¹⁶⁹³ *ibid.*

¹⁶⁹⁴ S. Marshall, *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice* (Routledge 2010) 294.

¹⁶⁹⁵ G. Erasmus, 'Namibia and the Southern African Customs Union' in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia's Foreign Relations: Historic Contexts, Current Dimensions and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 211.

2.4 The Common Monetary Area

The Common Monetary Area (CMA) covers countries that have pegged their national currency to the South African Rand at par. It covers are Namibia, Lesotho, South Africa and Swaziland.¹⁶⁹⁶ In other words, membership of the CMA is the same as that of the SACU, except Botswana. The Multilateral Monetary Agreement (MMA) of 1992 forms the legal basis of the CMA. Namibia joined the CMA by ratifying the MMA in 1992.

The CMA succeeded the Rand Monetary Area in 1986.¹⁶⁹⁷ The Rand Monetary Area started to function in 1974 and comprised Lesotho, South Africa, and Swaziland. At the time of the Rand Monetary Area, South West Africa/Namibia was subsumed under South Africa as one of its provinces.¹⁶⁹⁸

Through the MMA, member states wish to ensure regional monetary stability and improve economic and financial co-operation between them. The MMA enables the free movement of capital within the CMA. It formalizes the pegging of the Namibian dollar, the Lesotho loti, and the Swazi lilangeni to the South African Rand. Should member states disagree regarding the CMA, they must refer their dispute to a tribunal appointed by them.

2.5 The EU-SADC Economic Partnership

SADC entered into an economic partnership agreement (EPA) with the European Union (EU) in June 2016. This EU-SADC EPA offers tremendous trade benefits. However, the EPA has been criticized for being skewed in favour of the EU and, to a lesser extent, South Africa. The EPA was also criticized for undermining the

¹⁶⁹⁶ R. Sato, *Global Competition and Integration* (Kluwer 1999) 383.

¹⁶⁹⁷ Jian-Ye Wang and others, 'The Common Monetary Area in Southern Africa: Shocks, Adjustment, and Policy Challenges' (2007) IMF Working Paper 07/158 <<https://www.imf.org/external/pubs/ft/wp/2007/wp07158.pdf>> accessed 15 November 2018.

¹⁶⁹⁸ S. Shanghala, 'The Legal Dimension of Namibia's Foreign Relations' in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia's Foreign Relations: Historic Contexts, Current Dimensions and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 317.

protection of infant industry.¹⁶⁹⁹ Indeed, it is not yet certain that the EPA will be more beneficial than detrimental for Namibia.

3. Investment

After trade, investments constitute another major source of revenue and determinant of economic development. It is for this reason that the SADC Protocol on Finance and Investment¹⁷⁰⁰ enjoys such a central position in the international trade regime in Southern Africa. The Protocol incarnates the conviction of SADC that cooperation and coordination of macroeconomic, fiscal and monetary policies will accelerate growth, investment and employment in the region.¹⁷⁰¹

It may have happened that you used ‘trade’ and ‘investment’ interchangeably. After all, one and the same ministry deals with trade and investment in Namibia. However, though they share some common features, for instances, they strong links with international economic law, the two differ in one crucial respects. Whereas a trade transaction typically consists in a *one-off* exchange of goods and services, foreign direct investment (FDI) consists in a *long-term* relationship between the foreign investor and the host state – a long-term economic bond that can last more than 30 years.

A set of principles and rules that insulate foreign capital from political risks in the countries that host this capital. That international investment law uses, for that purpose, tools such as choice-of-law clauses, stabilization clauses, international arbitration, and provisions against expropriation. The primary goal of investment law is to protect the property rights of foreign investors against risks of expropriation mainly by internationalizing investment contracts.¹⁷⁰²

Namibia has recently changed its investment laws. The Namibia Investment Promotion Act, 9 of 2016 (NIPA), provides for the

¹⁶⁹⁹ See R. Grynberg, ‘Why We Should Tear Up the EPA Eventually’ *The Botswana Gazette* (23 June 2016). <<http://www.thegazette.news/?p=15209>> accessed 7 July 2017.

¹⁷⁰⁰ Southern African Development Community, Protocol on Finance and Investment, 2006.

¹⁷⁰¹ Preamble of the SADC Protocol on Finance and Investment, 2006.

¹⁷⁰² M. Bungenberg, *Permanent Sovereignty over Natural Resources* (Springer, 2015) 125-139.

promotion of sustainable economic development and growth through the mobilisation and attraction of foreign and domestic investment to enhance economic development, reduce unemployment, accelerate growth and diversify the economy.¹⁷⁰³ It also reserves certain economic sectors and business activities to certain categories of investors.¹⁷⁰⁴

The Act defines ‘foreign investor’ as:

- (a) a natural person who is not a Namibian that has made or is seeking to make an investment into Namibia; or
- (b) a company incorporated, registered or constituted in accordance with the laws of
 - (i) Namibia; or
 - (ii) any country other than Namibia,that is not directly or indirectly owned or controlled by a Namibian and that has made or is seeking to make an investment into Namibia in terms of this Act;

In enacting NIPA, the Namibian Parliament wanted to provide a clear and transparent framework for investment in Namibia,¹⁷⁰⁵ and an efficient mechanism for resolving investment disputes¹⁷⁰⁶ and for coordinating across ministries investment-related regulations and incentives.¹⁷⁰⁷ Crucially, the intention was also to promote sustainable economic growth and development by reducing unemployment, poverty and economic inequality in Namibia;¹⁷⁰⁸ and by diversifying the economy.¹⁷⁰⁹

The new investment law replaced the Foreign Investment Act, 27 of 1990. NIPA contains a number of great features, such as reserving certain sectors of the economy to Namibians. It also closes

¹⁷⁰³ Long title of the Namibia Investment Promotion Act, 9 of 2016.

¹⁷⁰⁴ *ibid.*

¹⁷⁰⁵ Section 2(a) of the Namibia Investment Promotion Act, 2016.

¹⁷⁰⁶ Section 2(b) of the Namibia Investment Promotion Act, 2016.

¹⁷⁰⁷ Section 2(c) of the Namibia Investment Promotion Act, 2016.

¹⁷⁰⁸ Section 2(d) (ii) of the Namibia Investment Promotion Act.

¹⁷⁰⁹ Section 2(d) (iii) of the Namibia Investment Promotion Act.

some loopholes found in the 1990 Act by, for example, obliging foreign investors to transfer knowledge and skills.¹⁷¹⁰

The new South African Protection of Investment Act¹⁷¹¹ inspired NIPA. However, the Namibian investment legislation did not make the radical shift that the new South African legislation represents. The business community, for example the European Chamber of Commerce, criticized the new South African investment, has also been blamed for the country's poor performance in attracting foreign investments.¹⁷¹²

Though moderate in its ideological orientation, the 2016 NIPA embodies at least three elements that may discourage foreign investors. First, it affirms a robust right to regulate foreign investments. From experience elsewhere and international jurisprudence, this sort of affirmation may erode investor's protections and thus scare away investment. The second element is the compulsory referral of disputes to local courts.¹⁷¹³ This element may unnerve some investors because they prefer to internationalize investment contracts as one of their key devices for protecting themselves against risks that host states expropriate their property rights.

Promulgated last year, NIPA already faces a barrage of criticisms: The business community was not sufficiently consulted, the Act creates duplications between line ministries and the Ministry of Trade, and so on. No wonder some attendees at a meeting organized by the Namibia Chamber of Commerce and Industry in July 2017 said that the Namibia Investment Promotion Act is better described as the "Namibia Investment *Prevention* Act".¹⁷¹⁴

¹⁷¹⁰ Section 26, read with sections 4(2) (b) (v), 14(f) and 24(3) (c), of the Namibia Investment Promotion Act.

¹⁷¹¹ Protection of Investment Act, 22 of 2015 (South Africa).

¹⁷¹² See D.P. Zongwe, 'Playing Hard to Get in a Sea of Many Fish: The Practical Implications of Saddling Foreign Investors With Host-Country Development' in D.P. Zongwe and Y. Dausab (eds), *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry* (Republic of Namibia 2017) 297; R. Geldenhuys, 'New Protection of Investment Act – The Implications for Foreign Investors' (2015) <<https://www.caveatlegal.com/new-protection-of-investment-act-the-implications-for-foreign-investors/>> accessed 15 November 2018.

¹⁷¹³ Section 28(4) of the Namibia Investment Promotion Act, 2016.

¹⁷¹⁴ I was invited to that meeting. I attended and participated in it.

Fortunately, after listening to the grievances of the business community, the Namibian government agreed to re-write its investment law. Still, Namibia lost 8.4 billion Namibian dollars (584 million US dollars) in FDI in 2017.¹⁷¹⁵ Relying on past experience in FDI history and on the disastrous consequences of the PIA in South Africa, I had predicted in 2017, even before Finance Ministry realized it in 2018, that Namibia's new investment policies would lead to capital flight.¹⁷¹⁶ I further predict that, unless it reverses the investment policies contained in NIPA, Namibia will bleed more foreign capital and will find it harder and harder to attract that capital.

4. The Southern African Customs Union

Headquartered in Windhoek, in the circle around the central business district, the Southern African Customs Union (SACU) plays a pivotal role in the economic development of Southern Africa to an extent that its sober and glass façade may not let you imagine. The significance of SACU for Namibia is underscored by the fact that it amounts to Namibia's largest source of revenue.¹⁷¹⁷

Over the past 29 years, SACU revenue averaged 31% of total government revenue.¹⁷¹⁸ By 2014, SACU revenue for Namibia's tax coffers hovered around 37% of total government income,¹⁷¹⁹ down from the peak of 47% in 2007.¹⁷²⁰ Even if Namibia has major sources of revenue other than SACU, the country remains highly dependent on SACU receipts. This heavy dependence on SACU reflects Namibia's continued close ties to South Africa.

The significance of SACU is also reflected in the observation that, if members states introduced dramatic changes in the SACU

¹⁷¹⁵ C. Ngatjiheue, 'Nam Loses N\$8,4b in Direct Investments' *The Namibian* (Windhoek, 12 October 2018) 1.

¹⁷¹⁶ See my prediction in Zongwe op cit 307-313.

¹⁷¹⁷ Martin Mwinga and others, *Namibia Fiscal Policy Analysis March 2019: Namibia's Fiscal Policy at the Cross Road* (First Capital Namibia 2019) 7; 'A Revised Outlook Is Not a Downgrade – Schlettwein' *New Era* (Windhoek, 6 September 2016) <<https://neweralive.na/posts/revised-outlook-downgrade-schlettwein>> accessed 15 November 2018.

¹⁷¹⁸ Mwinga and others op cit 7.

¹⁷¹⁹ R. Grynberg, 'Namibia Subsidises Botswana's Diamond Industry' *The Namibian* (Windhoek, 11 September 2015) 11.

¹⁷²⁰ *ibid.*

revenue-sharing formula, smaller SACU countries (Botswana, Lesotho, Namibia, and Swaziland, collectively known as ‘BLNS’) would suffer severe political instability. This grim scenario applies especially to Lesotho and Swaziland as they derive more than 60% of their income from SACU.¹⁷²¹ Namibia and Botswana do not depend on SACU receipts as much as Swaziland and Lesotho.¹⁷²²

Put in a positive fashion, SACU is a force for stability and prosperity in Southern Africa. It may not be a coincidence that three of the five SACU members (i.e., Botswana, Namibia and South Africa) rank as upper middle-income countries, unlike the great majority of countries in Southern Africa and the continent as a whole.

Though an undeniably significant institution, SACU comes up against stiff and profound challenges. Those challenges – which I sketch out at the end of this chapter – threaten economic development in the region generally and Namibia specifically.

4.1 Historical background

Created in 1910, SACU remains the world’s oldest functioning customs union.¹⁷²³ It binds Namibia, Botswana, Lesotho, South Africa and Swaziland. SACU finds its origins in British colonization of Southern Africa.¹⁷²⁴ Its members set up the customs territory with the chief goal of promoting economic development through the regional coordination of trade.¹⁷²⁵

SACU started as customs-union agreements that brought together territories of present-day Botswana, Lesotho, South Africa and Swaziland.¹⁷²⁶ It initially emerged as a result of the 1889 Customs Union Convention between the British Colony of Cape of Good Hope and the Orange Free State Boer Republic.¹⁷²⁷ Namibia became

¹⁷²¹ See Erasmus op cit 222.

¹⁷²² *ibid* 228.

¹⁷²³ V. Tonchi, W.A. Lindeke, and J.J. Grotper, *Historical Dictionary of Namibia* (The Scarecrow Press 2012) 406.

¹⁷²⁴ F. Soderbaum, ‘Old, New, and Comparative Regionalism: The History and Scholarly Development of the Field’ in T.A. Börzel and T. Risse (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press 2016) 19.

¹⁷²⁵ Southern African Customs Union, ‘About SACU: History of SACU’ <<http://www.sacu.int/show.php?id=394>> accessed 15 November 2018.

¹⁷²⁶ At the time, these political entities were known as Bechuanaland, Basutoland, and Swaziland, respectively.

¹⁷²⁷ Southern African Customs Union op cit.

a member of SACU after South Africa was entrusted with the administration of South West Africa following the defeat of Germany at the end of World War I.¹⁷²⁸

On 29 June 1910, the parties to SACU entered into a new agreement. The new arrangement put in place a common external tariff on goods imported from non-SACU states, the free movement of SACU-manufactured goods within the customs territory, and a revenue-sharing formula.¹⁷²⁹ From 1910 to 1969, South Africa effectively administered the common revenue pool, import duties, and excise policy.¹⁷³⁰ In 1969, Botswana, Lesotho, South Africa and Swaziland adopted a treaty that replaced and consolidated the customs-union agreements concluded in 1910 by those countries.¹⁷³¹ The 1969 SACU Agreement entered into force the following year, in 1970.¹⁷³² The 1969 deal included excise duties in the revenue pool and modified the revenue-sharing formula such that the revenues of Botswana, Lesotho and Swaziland increased each year by 42%.¹⁷³³

Namibia became officially and legally a member of the SACU by joining it after its independence from South Africa on 21 March 1990.¹⁷³⁴ Misgivings about the decision-making powers over customs and excise policies and about the fairness of the revenue-sharing had been simmering since the 1910 Agreement.¹⁷³⁵ Thus, when South Africa attained majority rule and ended apartheid, ministers from SACU member states met to renegotiate the 1969 SACU

¹⁷²⁸ *ibid.* South West Africa (Namibia) “was a *de facto* member, since it was administered as part of South Africa” before it became a *de jure* member.

¹⁷²⁹ *ibid.*

¹⁷³⁰ *ibid.*

¹⁷³¹ F. Zizhou, *Linkages between Trade and Industrial Policies in Botswana* (Trade and Industrial Policy Strategies 2009) 25.

¹⁷³² Southern African Customs Union (SACU) Agreement, 1969 <<http://www.sacu.int/show.php?id=565>>. The Agreement, which provides for the continuance of the customs union arrangements, which have been in operation between the four countries since 1910, was concluded on 11 December 1969, and will come into operation on 1 March 1970.

¹⁷³³ Southern African Customs Union *op cit.*

¹⁷³⁴ Erasmus, *op cit.* When the Republic of Namibia was born into sovereign statehood in 1990, it joined the Southern African Customs Union (SACU) as its fifth member state.

¹⁷³⁵ See Southern African Customs Union *op cit.*

Agreement.¹⁷³⁶ After eight years of negotiations, SACU ministers adopted a new SACU Agreement in 2002. The 2002 SACU Agreement came into force on July 15th, 2004.¹⁷³⁷ The 2002 SACU Agreement carried over several of its provisions from the 1969 SACU Agreement.

The new headquarters of SACU in Windhoek were inaugurated in 2015 by President Hage Geingob (Namibia), President Jacob Zuma (South Africa), President Seretse Khama Ian Khama (Botswana), Prime Minister Barnabas Dlamini (Swaziland), and Deputy Prime Minister Mothetjoa Metsing (Lesotho).¹⁷³⁸

4.2 SACU institutions

The 2002 SACU Agreement creates several institutions, some of which are not yet operational. The SACU Agreement sets up:

- a Council of Ministers,
- a Customs Union Commission,
- a Secretariat,
- a Tariff Board,
- technical liaison committees,
- *ad hoc* tribunals,
- four technical liaison committees to advise the Customs Union Commission,
- a common negotiating mechanism,¹⁷³⁹ and
- national bodies to assess the impact of tariffs within respective member states.¹⁷⁴⁰

¹⁷³⁶ C. Jenkins, 'New Forms of Co-operation and Integration in Emerging Africa: Integration and Co-operation in Southern Africa' (2001) Technical Papers No. 172

<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C D/DOC\(2001\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C D/DOC(2001)4&docLanguage=En)> accessed 15 November 2018.

¹⁷³⁷ See Southern African Customs Union, 'Annual Report for 2007' <http://www.sacu.int/docs/reports_annual/2007/annual_report.pdf> accessed 15 November 2018.

¹⁷³⁸ N. Nakashole, 'Inauguration of Sacu Offices on Thursday' *The Namibian* (Windhoek, 10 November 2015).

¹⁷³⁹ Article 31(2) of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁷⁴⁰ Article 14 of the Southern African Customs Union (SACU) Agreement, 2002.

The Tariff Board, the SACU Tribunal and national bodies are not yet running. The Council of Minister decided to substitute South Africa's International Trade Administration Commission (ITAC) for the Tariff Board. Whether member states chose this option as a temporary or permanent arrangement remains uncertain.

The SACU has not yet set up the Tribunal. No SACU Tribunal means no case law on SACU. In addition, SACU members replaced the common negotiating mechanism by an approach different from the one provided for in Article 31 of the SACU Agreement.

4.3 Salient features of the SACU arrangement

The salient features of the SACU arrangement include the regional regulation of trade in goods, the common external tariff, the single customs territory, the revenue-sharing formula, the common revenue pool, and the infant industry protection in favour of the BLNS (Botswana, Lesotho, Namibia, and Swaziland).¹⁷⁴¹ The SACU Agreement regulates trade in goods. It does not expressly concern trade in services.

The SACU Agreement provides for a common external tariff (CET). The CET means that SACU member states impose the same tariffs on goods imported from outside the SACU area. The operation of the CET also entails that the same import duty will be levied on all goods imported in any of the five member states.

The CET implies that SACU members negotiate with non-SACU members collectively.¹⁷⁴² However, contrary to what the SACU Agreement provides for, it is the South Africa's ITAC that administers the CET. As a matter of fact, the CET reflects the industrial policies of South Africa, and not those of the BLNS.¹⁷⁴³

¹⁷⁴¹ C. McCarthy, 'The Southern African Customs Union' (2003) <http://hubrural.org/IMG/pdf/fao_etude_sacu.pdf> accessed 15 November 2018.

¹⁷⁴² Article 31(1) of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁷⁴³ Research Department of the Bank of Namibia (ed), 'The Benefits of Regional Integration for Smaller Economies' (Annual Symposium 2005, Windhoek, 2005). South Africa has unilaterally set the common external tariffs and other trade remedies, often in response to its own domestic trade and industrial policy interests.

The SACU Agreement also creates a single customs territory. In that territory, all goods move¹⁷⁴⁴ and transit¹⁷⁴⁵ with almost complete freedom as no import duties can be levied on those goods. The SACU Agreement restricts imports or exports to protect, among other things, exhaustible natural resources, the environment, and the health of humans, animals and plants.¹⁷⁴⁶ The single customs territory provides an effectively integrated space for commercial activities by the private sector.¹⁷⁴⁷ This great level of regional integration and the advantages it has for the private sector are reinforced by the common monetary area that links all member states, except Botswana.¹⁷⁴⁸ Import duties and excise taxes are all paid into a common revenue pool.¹⁷⁴⁹

4.4 The revenue-sharing formula

The revenue-sharing formula deserves attention as well. Given the formula's vital importance, I discuss it separately and in greater detail.

The revenue-sharing formula is both unique and controversial since the early years of the SACU. SACU members tried to reform it with the 2002 SACU Agreement, but could not succeed in reforming it.¹⁷⁵⁰

SACU member states first implemented the existing revenue-sharing formula in December 2004 to calculate individual revenue

¹⁷⁴⁴ Article 18 of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁷⁴⁵ Article 24 of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁷⁴⁶ Article 18 of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁷⁴⁷ J. Amoako-Tuffour and others, 'Trade Facilitation and Economic Transformation in Africa' (2016) <<http://set.odi.org/wp-content/uploads/2016/03/SET-ACET-ATF-Trade-Facilitation-Paper.pdf>> accessed 15 November 2018.

¹⁷⁴⁸ See African Development Bank, *Southern Africa Regional Integration Strategy Paper 2011-2015* (African Development Bank 2011).

¹⁷⁴⁹ World Trade Organisation, 'Trade Policy Review, Southern African Customs Union' (2009) vii, 6 and 7 <https://www.wto.org/english/tratop_e/tpr_e/tp322_e.htm> accessed 15 November 2018.

¹⁷⁵⁰ See R. Grynberg & M. Motswapong, 'SACU Revenue Sharing Formula: Towards Developmental Agreement' (2012) Botswana Institute for Development Policy Analysis (BIDPA) Working Papers 32.

shares for the financial year 2005/06.¹⁷⁵¹ In practice, the Council determines and approves members' annual revenue shares in December for distribution during the subsequent year.¹⁷⁵²

The current revenue-sharing formula comprises three elements, namely the customs component, excise component, and the development component. SACU allocates the customs share on the basis of each member's share of intra-SACU imports. It allocates the excise share on the basis of each member's economic size, as measured by gross domestic product (GDP).¹⁷⁵³ Lastly, it fixes the development component at 15 percent of total excise revenue and distributes it according to the inverse of each country's GDP per capita.¹⁷⁵⁴

The structure of the revenue-sharing formula is designed in such a way that BLNS receive a significant share of their revenue from the customs component whilst South Africa gets more than 90 percent of its share from the excise component.¹⁷⁵⁵ The development component, though intended to compensate the least developed economies, is distributed more or less in equal shares among all the member states.¹⁷⁵⁶ The development component increased revenues for the BLNS states.¹⁷⁵⁷ However, implementing the current revenue-sharing formula poses a number of difficulties associated with the data that informs the variables in the formula.¹⁷⁵⁸

SACU revenue works in a pro-cyclical fashion in the sense that it changes in tune with cycles of trade flows. Thus, if trade increases within SACU, so do revenues or customs receipts; and vice versa.

¹⁷⁵¹ Southern African Customs Union, 'Review of the Revenue Sharing Arrangement' <<http://www.sacu.int/category.php?cat=Review%20of%20the%20Revenue%20Sharing%20Arrangement>> accessed 10 October 2018.

¹⁷⁵² *ibid.*

¹⁷⁵³ See *ibid.*

¹⁷⁵⁴ *ibid.*

¹⁷⁵⁵ *ibid.*

¹⁷⁵⁶ *ibid.*

¹⁷⁵⁷ O.C. Ruppel, 'SACU 100: Reflections on the World's Oldest Customs Union' (2010) 2 *Namibia Law Journal* 121, 123.

¹⁷⁵⁸ Southern African Customs Union, 'Review of the Revenue Sharing Arrangement' *op cit.*

More precisely, it takes two years after the relevant import duties have been levied that member states reportedly receive revenues.¹⁷⁵⁹

4.5 Protection of infant industries

a) General provisions

The SACU Agreement provides for infant industry protection in favour of Botswana, Lesotho, Namibia, and Swaziland (BLNS). Article 26(1) provides that

the Government of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into its area to enable infant industries in its area to meet competition from other producers or manufacturers in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.

Namibia used this provision to protect its struggling dairy industry. Article 21 of the SADC Protocol on Trade equally authorizes member states to suspend certain obligations of the Protocol in respect of like goods imported from other member states, as a temporary measure in order to promote an infant industry, and subject to WTO provisions.

With respect to the WTO rules, the principal justification for infant industry protection is found in GATT Article XVIII regarding ‘governmental assistance to economic development’. This provision recognises that, to attain the objectives of the GATT/WTO system, the WTO must work towards the progressive development of the member states’ economies.¹⁷⁶⁰ Thus, GATT provides that¹⁷⁶¹

¹⁷⁵⁹ R. Grynberg, ‘We’re Not Broke’ – But SACU Is Broke (n)!’ *The Namibian* (Windhoek, 7 October 2016) 11.

¹⁷⁶⁰ Article XVIII(1) of the General Agreement on Tariffs and Trade, 1994.

¹⁷⁶¹ Article XVIII(2) of the General Agreement on Tariffs and Trade, 1994.

[...] in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, members may take protective or other measures affecting imports in order to a) maintain sufficient flexibility in their tariff structures to be able to grant the tariff protection required for the establishment of a particular industry and b) apply quantitative restrictions for balance of payment purposes taking into full account the continued high level of demand for imports likely to be generated by their programmes of economic development.

b) The dairy industry in Namibia: a case study

The infant-industry protection provisions of the SACU Agreement led to litigation. (Pending the installation of the SACU Tribunal, litigation related to SACU takes place in national courts) *Clover Dairy Namibia v Minister of Trade and Industry*¹⁷⁶² makes for an edifying case study on the protection of an infant industry in the Namibian context.

Before the year 2000, Namibia had no restrictions on the importation of dairy products from South Africa. In 2000, the dairy industry in Namibia benefited from certain protections from the Namibian government. Namibia imposed a levy of 42.5 cents per litre on ultra high temperature (UHT) milk imported into Namibia.¹⁷⁶³ In 2007, it extended the protection of the domestic dairy industry under Article 26 of the 2002 SACU Agreement.¹⁷⁶⁴ The protective tariffs of 2007 continued until January 2012 when the protection lapsed. (In terms of Article 26 of the SACU Agreement, the duration of infant-industry protection may not exceed a period of 8 years unless otherwise determined by the SACU Council.)

Dairy products became available at lower prices in Namibia after the infant-industry protection lapsed. Namibia Dairies, the only processor of UHT milk in Namibia at the time of the *Clover* litigation, could no longer compete with the lower prices of imported South African dairy products. For that reason, the Dairy Producers'

¹⁷⁶² *Matador Enterprises (Pty) Ltd (A 352/2013) and Clover Dairy Namibia (Pty) Ltd (A386/2013) v The Minister of Trade and Industry* [2014] NACHMD 156 (16 May 2014). Hereinafter '*Clover*'.

¹⁷⁶³ Republic of Namibia, Government Gazette, Government Notice No. 187 of 2000.

¹⁷⁶⁴ Republic of Namibia, Government Gazette, Government Notice 61 of 2007.

Association of Namibia (DPA) and Namibia Dairies applied to the Ministry of Trade and Industry in April 2013 asking the Ministry to continue the protection of the domestic dairy industry. Among other submissions, they claimed that Namibia Dairies accounted for about 50% of the commercial dairy product market in respect of UHT milk in Namibia and that, given the small size of the Namibian dairy market, Namibia Dairies would be “highly vulnerable to market diversification from South Africa”.¹⁷⁶⁵

In May 2013, Clover Dairy Namibia (“Clover”) objected to the request by Namibia Dairies and DPA for the continuation of the infant-industry protection and asked the Namibian Trade Ministry for an opportunity to present its case in writing or verbally. Most relevantly, Clover addressed competition principles and the 2002 SACU Agreement. Specifically, it invoked the free movement of SACU-manufactured products¹⁷⁶⁶ and the obligation on SACU members to refrain from restricting the importation of SACU-manufactured products in order to protect domestic industries.¹⁷⁶⁷ Matador Entreprises (“Matador”) submitted objections along the same lines as Clover.

In response, the Namibian Trade Ministry hosted on 18 July 2013 a consultative meeting with stakeholders, including Namibia Dairies, DPA, Clover and Matador. Despite the consultative meeting, the Trade Ministry published a notice prohibiting the importation of dairy products into Namibia.¹⁷⁶⁸ Following instructions from the Cabinet issued on 2 July 2013, the Trade Minister prohibited on 28 August 2013 dairy imports in terms of the Import and Export Control Act of 1994.¹⁷⁶⁹

Clover and Matador, in two separate proceedings, lodged an application with the High Court of Namibia. In both applications, Clover and Matador complained that the provisions of sections 2 and

¹⁷⁶⁵ See *Clover* [12].

¹⁷⁶⁶ Article 19 of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁷⁶⁷ Article 25(3) of the Southern African Customs Union (SACU) Agreement, 2002.

¹⁷⁶⁸ Republic of Namibia, Government Gazette, Government Notice 245 of 2013.

¹⁷⁶⁹ Section 2(1) (b) of the Import and Export Act, 30 of 1994.

3 of the Import and Export Act are unconstitutional on several grounds.

For Smuts J, the entire process was “hopelessly and fundamentally flawed.”¹⁷⁷⁰ According to the learned judge:¹⁷⁷¹

The process of the decision making is thus plagued with manifold vitiating irregularities which establish that the Minister (and the Ministry) misconstrued the nature of his powers, did not properly apply his mind to relevant matter such as the requirements of the Act or, the Dairy Products Act, the submissions made by [Clover and Matador] in addressing the grounds and factual inaccuracies contained in the [DPA’s submissions]. It would also seem that the Minister approached the matter – insofar as he made a decision – with less than an open mind required by s 2, having expressed himself unequivocally in favour of quantitative restrictions in his memorandum to Cabinet. The duty to act fairly under Art 18 was also infringed by the failure to inform interested parties of the prior Cabinet decision on the matter. All these factors were compounded by the subsequent failure to provide reasons when requested by Clover.

Although the Namibian government referred several times to the SACU Agreement of 2002,¹⁷⁷² the decision of the High Court in *Clover* did not rely on that SACU Agreement. Instead, to set aside the Namibian Trade Minister’s decision to restrict dairy imports from South Africa, the judge drew from administrative law, as laid down in Article 18 of the Namibian Constitution, the common law and the applicable cases. The reasons for his ruling mentioned or alluded to the *audi alteram partem* principle,¹⁷⁷³ the duty to provide reasons for administrative actions and to apply one’s mind to the matter at hand, the rule against bias, and the duty to consult. All these rules and principles emanate from administrative law, if not constitutional law.

¹⁷⁷⁰ *Clover* [110].

¹⁷⁷¹ *Clover* [111].

¹⁷⁷² Republic of Namibia, Government Gazette, Government Notice No. 187 of 2000; Republic of Namibia, Government Gazette, Government Notice 61 of 2007.

¹⁷⁷³ In substance, this principle holds that an administrative official considering an official action must afford the parties likely to be negatively affected by his action an opportunity to present reasons against that action.

They do not directly derive from the provisions of the 2002 SACU Agreement.

The judge's approach in *Clover* also raises questions about the place of international law in the Namibian legal system. Under international law, treaties (in this case, the SACU Agreement) trump the provisions of domestic law, but Article 144 of the Namibia Constitution subjects the application of international law to the Constitution itself and Acts of Parliament (in this case, the Import and Export Control Act). Strictly enforcing the Namibian Constitution would therefore mean that the Import and Export Act justified the dairy import restrictions, though this outcome would contradict international law. It was therefore fortunate or clever, though convoluted, for the judge to go around that hurdle by calling on administrative law and constitutional law.

4.6 Further challenges

SACU grapples with several formidable challenges. These challenges put at risk economic development in Namibia and the SACU region. The profitability and very survival of SACU depend on how member states tackle these issues.

Arguably, the revenue-sharing formula still constitutes the biggest challenge.¹⁷⁷⁴ Another challenge relates to the difficulty of integrating economically unequal partners. The South African economies dwarf the much smaller economies of all the other SACU members (i.e., the BLNS).

Related to that challenge, smaller member states must, in return for customs revenue, give up trade and tariff policy space. This situation has led to accusations by South Africa that its economy subsidizes BLNS economies and to counterclaims by the BLNS that South Africa through SACU hampers the industrialization of the BLNS. A fundamental question that must ask yourself is whether the BLNS would fare better or worse without SACU. Most experts may find this question difficult to answer, especially in the absence of

¹⁷⁷⁴ S. Payne, 'SACU's Uncertain Future', (2014) <<https://www.tralac.org/discussions/article/5350-sacu-s-uncertain-future.html>> accessed 14 November 2018. See also C. Benjamin, 'Sacu's Day of Reckoning Has Arrived' *Mail & Guardian* (29 November 2013) <<https://mg.co.za/article/2013-11-29-00-sacus-day-of-reckoning-has-arrived>> accessed 15 November 2018.

reliable empirical evidence on which to base such an answer. The risks of economic turmoil and political instability if a BLNS state, notably Swaziland and Lesotho, pulled out from SACU raise the multibillion-Rands stakes of that question. With so much at stakes, BLNS states would be better advised to conduct thorough empirical research before they consider venturing outside SACU on their own. If anything, and as shown in *Clover*, the struggle of the dairy industry to stay afloat in the face of competition from South Africa proves that BLNS states cannot take for granted that, by eliminating competition, they will easily build strong domestic industries.

Third, SACU revenues are decreasing. These decreasing revenues have adversely affected Namibia's 2016 budget and dampened the short-term economic outlook for Namibia.¹⁷⁷⁵ Moreover, in 2016, Namibia was required to pay back part of the SACU revenue it received because it was overpaid.¹⁷⁷⁶ One expert suggested the creation of a "revenue stabilization fund" to stabilize year-to-year fluctuations in customs receipts.¹⁷⁷⁷

Fourth, the 2002 SACU Agreement is yet to be fully implemented. Member states have not yet applied Part 8 of the Agreement as the Tariff Board, the SACU Tribunal, and national bodies provided for in the SACU Agreement do not run yet. These implementation gaps may prevent SACU from functioning effectively.¹⁷⁷⁸ Fifth, that situation has major negative implications. For one thing, SACU-related litigation takes place in national courts. *Clover* illustrates this implication. For another, parties sometimes get private remedies, which is problematic. Sixth and last, the SACU region has in past few years witnessed increased lobbying by special interest groups.

¹⁷⁷⁵ C. Kaira, 'Sacu Revenue Shortfalls a Concern' *The Namibian* (Windhoek, 6 October 2016) 17.

¹⁷⁷⁶ R. Chirara 'Sacu Reforms to Destabilize Region' *Windhoek Observer* (Windhoek, 13 November 2015) <<http://www.observer.com.na/index.php/national/item/5363-sacu-reforms-to-destabilize-region>> accessed 15 November 2018.

¹⁷⁷⁷ R. Grynberg, 'We're Not Broke' op cit.

¹⁷⁷⁸ Ruppel op cit 131.

5. Does the world trading system benefit Namibia?

The observation I run through this book details the various ways in which international law benefits Namibia. But economic relations challenge that overall observation because the practical effects of that field of international law have often upset expectations. Chang, for instance, produces evidence that neoliberal policies, including free trade, slowed growth in developing countries.¹⁷⁷⁹ Ugandan scholar Tandon even contends that the West wages war against poor nations from the global South using international trade as a weapon.¹⁷⁸⁰ Ogbonna stresses that, in reality, the WTO works to open domestic markets to foreign traders, and not to spur development.¹⁷⁸¹

Whatever position you may assume in this debate, everyone can see that international economic relations are defined by unequal exchange. As Namibia has alluded to in its *Policy on International Relations and Cooperation*,¹⁷⁸² the rules of international trade have not levelled the playing field. On the one hand, regional trade in the form of SACU is undoubtedly the engine that drives Namibia's economic growth. On the other hand, SACU seems to perpetuate relations of dependence and domination between Namibia and South Africa. After all, SACU evolved historically as a British (and later South African) colonial structure. SACU's black-and-white background underlines the ambiguous relationship between international economic law and developing countries: International law disadvantages developing states in some respects but nonetheless benefits them in other respects.

Maybe the answer to this issue depends on one's perspective. Seen in this light, whether international trade benefits or harms developing nations in general or individually amounts to asking whether a glass is half full or half empty. Either way, water remains an invaluable resource, just like minerals that it contains. And this is

¹⁷⁷⁹ H.-J. Chang, *23 Things They Don't Tell You About Capitalism* (Bloomsbury Press 2012).

¹⁷⁸⁰ Y. Tandon, *Trade Is War: The West's War against the World* (OR Books 2015).

¹⁷⁸¹ J.I. Ogbonna, 'The WTO for Whom: Towards a Philosophy of WTO Law' in E.T. Laryea, N. Madolo, and F. Sucker, *International Economic Law: Voices of Africa* (Siber Ink 2012) 39-41.

¹⁷⁸² Republic of Namibia op cit 57.

precisely what I talk about in the next chapter, where I deal with the law governing activities on seas of water.

You can hardly talk about Namibia and its international economic relations without mentioning its marine affairs. Namibia boasts a huge Atlantic coast that constitutes its Western border. The 1,572-kilometer coastline, coupled with its relatively well-developed infrastructure, gears up Namibia for a bigger role as one of the region's logistical hubs. This blue economy¹⁷⁸³ builds up state coffers. In 1991, the High Court of Namibia described the fishing industry in *Pineiro* as “an important link in [Namibia's] economic chain”.¹⁷⁸⁴ This is the case despite the fact that the fishing sector's contribution to the economy has stagnated and lagged overall growth.¹⁷⁸⁵ In particular, Sherbourne claims that low profit and excess capacity define the fragmented, secretive and politicized fishing industry – an industry largely linked to foreign players.¹⁷⁸⁶

Nevertheless, fishing and the exploitation of marine resources in general remain one of the country's vital sources of wealth. If only because Namibia possesses some of the world's most productive fishing grounds.¹⁷⁸⁷ And, unlike mining – another important source of wealth, marine resources are renewable, if managed sustainably.

This major facet of Namibia and its economy are to a large extent regulated by international law.¹⁷⁸⁸ The central role of international law in regulating marine affairs should not surprise you given the transboundary nature of the sea. The special significance of the law of the sea is underlined by the fact that seas cover roughly 70 percent

¹⁷⁸³ For more information on the blue economy in general and the blue economy of the Indian Ocean Region, see V.N. Attri and N. Bohler-Muller (eds), *The Blue Economy Handbook of the Indian Ocean Region* (Africa Institute of South Africa 2018).

¹⁷⁸⁴ *S v Pineiro and Others* (2) 1993 NR 49 (HC) 57.

¹⁷⁸⁵ R. Sherbourne, *Guide to the Namibian Economy 2017* (Institute for Public Policy Research 2016) 135.

¹⁷⁸⁶ *ibid.*

¹⁷⁸⁷ *ibid* 137.

¹⁷⁸⁸ On the law of the sea in general, see D.R. Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).

of the Earth's surface. Seas perform two functions: they serve as means of communications and as a reservoir of resources, both living and non-living.¹⁷⁸⁹ Those essential functions motivated states to develop rules to regulate the seas. And, the regulation of the seas in Namibia has spawned a host of legislation¹⁷⁹⁰ and litigation¹⁷⁹¹ on maritime transport and the exploitation of marine resources.

1. Short history

The law of the sea is almost as old as international law. One of the earliest areas regulated by international law,¹⁷⁹² the law of the sea has also been for a long time one of international law's most developed parts.¹⁷⁹³ The traditional law of the sea partly stem from ancient maritime codes, for instance, the Rhodian Sea Law¹⁷⁹⁴ developed by Roman emperor Justinian in the 6th century.

Until the 1950s, the basic principles of the law of the sea consisted of rules of customary international law.¹⁷⁹⁵ One such

¹⁷⁸⁹ M. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 490.

¹⁷⁹⁰ Examples of legislation regulating maritime transport include the Merchant Shipping Act, 2 of 1951 (regulating merchant shipping); the Marine Traffic Act, 2 of 1981 (regulating marine traffic holistically); and the Namibian Ports Authority Act, 2 of 1994 (establishing the Namibian Ports Authority to manage ports and lighthouses in Namibia). Examples of legislation regulating the exploitation of marine resources include the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

¹⁷⁹¹ *Pineiro and Others v Minister of Justice and Others* 1991 NR 283 (HC); *S v Carracelas and Others* (1) 1992 NR 322 (HC); *S v Carracelas and Others* (2) 1992 NR 329 (HC); *S v Carracelas and Others* (3) 1992 NR 336 (HC); *S v Martinez* 1993 NR 1 (HC); *S v Pineiro and Others* 1993 NR 24 (HC); and *Bourgnwells Ltd (Owners of MFV Ofelia) v Shepalov and Others* 1999 NR 410 (HC). See also D.J. Devine, 'Marine Law Developments in Namibia' (1993) 8 *The International Journal of Marine and Coastal Law* 471 (describing constitutional, legislative, and judicial developments in the law of the sea between 1990 and 1992).

¹⁷⁹² K. Zou, *Law of the Sea in East Asia: Issues and Prospects* (Routledge 2005) 34.

¹⁷⁹³ M.W. Janis, *An Introduction to International Law* (3rd edn, Aspen 2003) 222.

¹⁷⁹⁴ *ibid.* The Rhodian Sea Law ('*Lex Rhodia*' in Latin) was contained in a statute in the Digest of the Code of Justinian. The Code dealt with maritime customary law from ancient Rhodes, an island of present-day Greece. It focused on the liability for the cost of lost or damaged cargo. It shaped maritime law of Italian cities in the Middle Ages. See The Editors of Encyclopaedia Britannica, 'Rhodian Sea Law', *Encyclopaedia Britannica* <<https://www.britannica.com/event/Rhodian-Sea-Law>> accessed 4 October 2018.

¹⁷⁹⁵ T. Buergenthal and S.D. Murphy, *Public International Law in a Nutshell* (5th edn, West 2013) 268.

principle is the freedom of the high seas. Grotius, in his 1608 publication *Mare Liberum* (or “The Freedom of the Seas” in English), propounded the principle that pushes for the access to the high seas by ships of all states.¹⁷⁹⁶ He grounded that principle on another principle: Every nation is at liberty to travel to every other nation and to trade with it.¹⁷⁹⁷ The law of the sea from the 20th century to the 21st boils down to the observation that individual nations seeking to expand their own maritime jurisdictions for economic reasons challenged the traditional high seas freedoms.¹⁷⁹⁸

In 1702, the Dutch jurist Bynkershoek aired the principle that territorial sovereignty extended to vessels within the range of a cannon mounted on the shore.¹⁷⁹⁹ Accordingly, jurists and statesmen started to accept a cannon-shot rule, a ‘belt’ or area over which a state could fire a cannon to measure the extent of its territorial sea.¹⁸⁰⁰ By the end of the 18th century, the cannon-shot rule was accepted in the United States and in western and southern Europe.¹⁸⁰¹ However, as the cannon-shot rule lacked precision, an alternative became necessary. In 1782, the Italian scholar Galiani suggested a three-mile rule as measurement of the extent of the territorial sea. Still, during and after the Napoleonic wars, the British and American prize courts made the cannon-shot rule into a three-mile rule.¹⁸⁰²

¹⁷⁹⁶ R. Hakluyt (tr), *Mare Liberum, sive de jure quod Batavis competit ad Indicana commercia dissertatio* (Lodewijk Elzevir 1609), later translated in English as H. Grotius, *The Freedom of the Seas* (Oxford University Press 1916).

¹⁷⁹⁷ H. Grotius, *The Freedom of the Seas* (Oxford University Press 1916) 7.

¹⁷⁹⁸ Janis op cit 222.

¹⁷⁹⁹ As explained by I. Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 179.

¹⁸⁰⁰ *ibid.*

¹⁸⁰¹ Historically, the notion of territorial waters found its origin in the debate over the status of the sea in the formative period of modern international law in the 17th century. Even though the doctrine that the sea, by virtue of its nature, avails ships from all nations was at the end upheld, most commentators did recognize that a coastal state needs to exercise some jurisdiction in the waters adjacent to its shores. Two very different concepts emerged: First, the region of jurisdiction do not extend beyond cannon-shot range; and, second, the region should cover a much bigger belt of uniform width adjacent to the coast. And, in the late 18th century, these concepts merged in a compromise view that proposed a fixed limit of 3 nautical miles. See The Editors of Encyclopaedia Britannica, ‘Territorial Waters’, *Encyclopaedia Britannica*

<<https://www.britannica.com/topic/territorial-waters>> accessed 31 July 2017.

¹⁸⁰² Brownlie op cit 179.

It is noteworthy that the claims to jurisdiction over the high seas for certain purposes coincided with claims over a maritime belt.¹⁸⁰³ This coincidence gives you some clues about how the law of the sea evolved. Claims to sovereignty over the high seas have always hardened into claims over maritime belts.¹⁸⁰⁴ Today, all states claim jurisdiction over a “belt of sea adjacent to their coastlines”.¹⁸⁰⁵ The technical term is now ‘territorial sea’.¹⁸⁰⁶ The general proposition is that all states have rights relating to sovereignty over the territorial sea. The very first article of the Convention on the Territorial Sea of 1958 also affirms this proposition. That treaty and the rules of international law circumscribe claims over territorial seas.¹⁸⁰⁷

2. Sources of the law of the sea

The sources of international law of the sea consist of international customs, four treaties, and the United Nations Convention on the Law of the Sea.¹⁸⁰⁸ Two conferences were held in Geneva, Switzerland, on the law of the sea between 1958 and 1960. The first conference, held in 1958, adopted four treaties on the law of the sea:

1. the Geneva Convention on the Territorial Sea and the Contiguous Zone (TSC),
2. the Geneva Convention on the High Seas (HSC),
3. the Geneva Convention on the Fishing and Conservation of the Living Resources of the High Seas, and
4. the Geneva Convention on the Continental Shelf (CSC).

As I mentioned a few sentences earlier, those four treaties really matter because they constitute one source of the law of the sea.

¹⁸⁰³ *ibid.*

¹⁸⁰⁴ Brownlie *op cit* 180.

¹⁸⁰⁵ *ibid* 177.

¹⁸⁰⁶ *ibid.*

¹⁸⁰⁷ Article 2 of the Convention on the Territorial Sea and the Contiguous Zone, 1958.

¹⁸⁰⁸ L.B. Sohn, *Cases and Materials on the Law of the Sea* (2nd edn, Brill Nijhoff, 2014) 31.

3. The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (LOSC) is without a doubt the prime source of the law of the sea.¹⁸⁰⁹ That voluminous legal instrument contains 320 articles and nine annexes. The United Nations (UN) adopted the LOSC on 10 December 1982.¹⁸¹⁰ Namibia (through the United Nations Council for Namibia) ratified the LOSC on 18 April 1983.¹⁸¹¹ And, by virtue of Articles 140 and 144 of the Constitution, the LOSC integrated Namibian law. In addition, Namibia passed in the year of Independence the Territorial Sea and Exclusive Economic Zone of Namibia Act.¹⁸¹² The Act borrowed certain provisions of the LOSC, most notably rules on the demarcation of maritime zones; more of which below.

In ratifying the LOSC, state parties wished to settle all issues relating to the law of the sea.¹⁸¹³ They realized that the problems of ocean space intersect¹⁸¹⁴ and need therefore a holistic approach.¹⁸¹⁵ They ratified the treaty on the assumption that the settlement of all issues relating to the law of the sea will go a long way in fostering a just and equitable international economic order.¹⁸¹⁶

Between 1973 and 1982, the Third United Nations Law of the Sea Conference met in many sessions to address problems that cropped up after states adhered to the four Geneva conventions on

¹⁸⁰⁹ See also I.V. Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff 2012) 292.

¹⁸¹⁰ Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122; (1982) 21 I.L.M. 1261.

¹⁸¹¹ D.J. Devine, *Maritime Zone Legislation for a New South Africa: Historical, Contemporary and International Perspectives* (University of Cape Town 1992) 19. See also United Nations, 'Oceans and Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements' <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 5 October 2018.

¹⁸¹² Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

¹⁸¹³ Preamble of the United Nations Convention on the Law of the Sea, 1982.

¹⁸¹⁴ *ibid.*

¹⁸¹⁵ See Preamble of the United Nations Convention on the Law of the Sea, 1982.

¹⁸¹⁶ *ibid.*

the law of the sea.¹⁸¹⁷ Following those meetings at the Conference, the UN adopted the LOSC in Montego Bay, Jamaica. Some 155 states signed the LOSC.¹⁸¹⁸ The United States (US) was not among those signatories.

The treaty required 60 ratifications before it could come into operation. It took a decade before the LOSC could meet that threshold. The LOSC entered into force in 1994. In 1993, the High Court of Namibia in *Martinez*¹⁸¹⁹ had to decide whether the LOSC bound Namibia although 13 ratifications were still outstanding. Defence counsel argued that the 1969 Vienna Convention on the Law of Treaties stipulated that a treaty duly ratified by a state binds that state even if the treaty has not come into force yet. Levy J ruled that the LOSC did not bind Namibia because Namibia (through the UN Council for Namibia) did not ratify the Vienna Convention.¹⁸²⁰ It is, however, clear that Levy J erred because, as I explained in Chapter 7, the provisions of the Vienna Convention have ripened into customary international law and, as such, they do not require ratification by a state before they can bind that state.

Except for Iceland, none of the 60 states that ratified the LOSC by the year 1994 were industrialized nations.¹⁸²¹ The greatest obstacle related to the LOSC's treatment of deep-sea mining.¹⁸²² Before the LOSC came into force, an agreement was reached and formalized on 28 July 1994 through the New York Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (the 'New York Agreement').¹⁸²³ Namibia ratified the New York Agreement one year later on 28 July 1995.¹⁸²⁴

¹⁸¹⁷ O.P. Sharma, 'India and the United Nations Convention on the Law of the Sea' (1995) 26 *Ocean Development and International Law* 391-421.

¹⁸¹⁸ Janis op cit 225.

¹⁸¹⁹ *S v Martinez* 1993 NR 1 (HC).

¹⁸²⁰ *ibid* 13-15.

¹⁸²¹ Janis op cit 225-226.

¹⁸²² *ibid* 226.

¹⁸²³ Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, (1994) 33 I.L.M. 1309 (hereinafter the "1994 New York Agreement" or simply the "New York Agreement").

¹⁸²⁴ United Nations, 'Oceans and Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements'

State parties to the New York Agreement wanted to “facilitate universal participation” in the LOSC¹⁸²⁵ and, in particular, accommodate developed states, such as the US and the United Kingdom (UK), who objected to the way the LOSC treated the question of the deep-sea bed. The New Agreement addressed the objections of developed states by rebuilding the decision-making procedures applying to Part XI of the LOSC to grant those states adequate influence in decisions on the sea-bed.¹⁸²⁶ (I give finer details of this overhaul in the ‘deep-sea bed’ section towards the end of this chapter) Furthermore, the New York Agreement provides that, in cases where the provisions of the Agreement and the LOSC clash, the provisions of the New York Agreement will prevail.¹⁸²⁷

Lawyers and policy makers could regard the New York Agreement as an amendment of the LOSC¹⁸²⁸ or as an authoritative interpretation of Part XI of the LOSC. Whatever the approach, states generally deem the New York Agreement an integral part of the LOSC.

In the final analysis, the New York Agreement achieved one of its first goals. Indeed, it ‘met the objections’ of the US and other major industrialized nations.¹⁸²⁹ After the New York Agreement was reached, the LOSC received many more ratifications. As of 2018, more than 160 states have ratified the LOSC.¹⁸³⁰ At the same time, the New York Agreement symbolizes the harsh reality that

<http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 5 October 2018.

¹⁸²⁵ Preamble of the New York Agreement, 1994.

¹⁸²⁶ See Annex: Section 3 of the New York Agreement, 1994.

¹⁸²⁷ Article 2(1) of the New York Agreement, 1994.

¹⁸²⁸ E. Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind* (Springer 2011) 112.

¹⁸²⁹ See Message From the President of the United States to the US Senate, transmitting the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea to the US Senate for ratification, Senate, 103rd Congress, 2nd session, Treaty Doc. 103-39, p.IV, <https://www.foreign.senate.gov/imo/media/doc/treaty_103-39.pdf> accessed 5 October 2018 (hereinafter ‘Message from the US President to the US Senate’).

¹⁸³⁰ See United Nations Treaty Collection, ‘United Nations Convention on the Law of the Sea’ <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 5 October 2018 (indicating that 168 states ratified the LOSC).

international law, especially economic relations, works more as a structure that entrenches stark power inequalities between rich and developing states than as a tool for the prosperity and economic emancipation of nations in the Global South.

4. Sustainable development of marine resources in Namibia

Sustainable development sits at the heart of the blue economy and the management of marine resources in Namibia.¹⁸³¹ In particular, the Environmental Management Act, 7 of 2007, and the Marine Resources Act, 27 of 2000, both enshrine the principles pertaining to sustainable development. In terms of the Environmental Management Act, the Namibian government must see to it that economic actors use renewable resources on a sustainable basis for the benefit of present and future generations;¹⁸³² involve communities in managing natural resources and sharing benefits from the use of those resources;¹⁸³³ undertake assessments for activities which may significantly affect the environment;¹⁸³⁴ and protect Namibia's cultural and natural heritage, including its biological diversity.¹⁸³⁵

In addition, the government and economic agents must choose the option that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the short and long term.¹⁸³⁶ Any person who damages the environment must pay the costs incurred to rehabilitate the damage to the environment and to human health caused by pollution.¹⁸³⁷ Last but not least, the Environmental Management Act also embodies the precautionary principle. If there is sufficient evidence that establishes threats of serious or irreversible damage to the environment, lack of

¹⁸³¹ See, for example, the Aquaculture Act, 18 of 2002 (providing for the sustainable development of aquaculture activities); and the Inland Fisheries Resources Act, 1 of 2003 (providing for the sustainable development of inland fisheries resources).

¹⁸³² Section 2(a) of the Environmental Management Act, 7 of 2007.

¹⁸³³ Section 2(b) of the Environmental Management Act, 7 of 2007.

¹⁸³⁴ Section 2(e) of the Environmental Management Act, 7 of 2007.

¹⁸³⁵ Section 2(g) of the Environmental Management Act, 7 of 2007.

¹⁸³⁶ Section 2(h) of the Environmental Management Act, 7 of 2007.

¹⁸³⁷ Section 2(j) of the Environmental Management Act, 7 of 2007.

full scientific certainty will give the state no ground to postpone cost-effective measures aimed at preventing environmental degradation.¹⁸³⁸

These principles apply to the Marine Resources Act as well. On the strength of Article 100 of the Namibian Constitution, the Act reaffirms the state's ownership of marine resources.¹⁸³⁹

The State owns and exercises sovereign rights over marine resources within the exclusive economic zone, territorial waters and the continental shelf in accordance with Article 100 of the Namibian Constitution and the United Nations Convention on the Law of the Sea of 10 December 1982.

The Marine Resources Act thus confirms the status of the LOSC as a piece of Namibian law.

5. Zones covered by the law of the sea

Under the LOSC and related legal instruments, the rules and principles of the law of the sea turn on certain major maritime zones and under certain uses of the sea.¹⁸⁴⁰ As a matter of general observation, the closer a zone is to a state's coast the higher the levels of coastal state sovereignty.¹⁸⁴¹ In the specific context of Namibia, through Article 100 of the Constitution, you can identify the principal maritime zones of the country:

Land, water and resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State...

The continental shelf, territorial 'waters', and the exclusive economic zone undergird the law of the sea in Namibia.

In the past, the delimitation of maritime zones were measured by the range of vision of a fair day or the range of cannons fired from

¹⁸³⁸ Section 2(k) of the Environmental Management Act, 7 of 2007.

¹⁸³⁹ Section 3(1A) of the Marine Resources Act, 27 of 2000.

¹⁸⁴⁰ Buergenthal and Murphy op cit 269.

¹⁸⁴¹ ibid 270.

the shore.¹⁸⁴² Today, these maritime zones are measured from 'baselines'.¹⁸⁴³ A 'normal' baseline marks the low-water line along the coast as officially recognized by the coastal states.¹⁸⁴⁴ Baselines serve to demarcate internal waters from external waters and to define the lines from which the outer limits of maritime zones are measured.¹⁸⁴⁵

The law of the sea covers several maritime zones, to wit: internal waters, the territorial sea, the contiguous zone, exclusive economic zones, the high seas, straits, the continental shelf, and the deep-sea bed. Measured seaward from the baselines, these zones are the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf. These four maritime zones considerably expand the coastal states' sovereignty in the oceans at the detriment of the traditional international regime.¹⁸⁴⁶ Shortly after Independence, the Namibian Parliament passed the Territorial Sea and Exclusive Economic Zone of Namibia Act, No. 3 of 1990, to "determine and define the territorial sea, internal waters, contiguous zone, exclusive economic zone and continental shelf of Namibia."¹⁸⁴⁷

International law treats internal waters (i.e., waters landward of a state's baselines) as part of the land territory of a coastal state.¹⁸⁴⁸ But the law of the sea mainly focuses on external waters (i.e., waters seaward of a state's baselines).¹⁸⁴⁹ Coastal states have sovereignty over their internal waters and territorial sea. Their sovereignty extends to the bed and the subsoil of their territorial sea as well as the airspace above the territorial sea.¹⁸⁵⁰

¹⁸⁴² Brownlie op cit 185.

¹⁸⁴³ Sohn op cit 560.

¹⁸⁴⁴ Article 5 of the United Nations Convention on the Law of the Sea, 1982.

¹⁸⁴⁵ Buergenthal and Murphy op cit 270.

¹⁸⁴⁶ Janis op cit 227.

¹⁸⁴⁷ Long title of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

¹⁸⁴⁸ Buergenthal and Murphy op cit 270.

¹⁸⁴⁹ *ibid.*

¹⁸⁵⁰ See Article 2 of the Convention on the Law of the Sea, 1982.

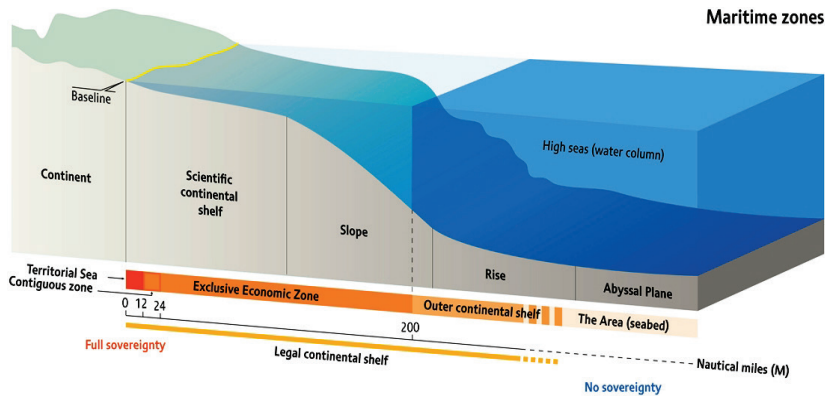


Figure 1: Graphic representation of maritime zones

Source: Riccardo Pravettoni, UNEP/GRID-Arendal, 2009

5.1 Internal waters

‘Internal waters’ refer to the waters inside the land but that directly flow out into the territorial sea. For the Territorial Sea and Exclusive Economic Zone of Namibia Act, ‘internal waters’ are “the waters landward from its low water line or any other base line from which the territorial sea is measured”.¹⁸⁵¹ Internal waters form part of the land territory of the coastal state.¹⁸⁵² More specifically, internal waters belong to the sea that is not either the high seas or the territorial sea.¹⁸⁵³

A coastal state enjoys full territorial sovereignty over internal waters.¹⁸⁵⁴ However, the right of innocent passage that the law of the sea grants to other states represents an exception to this general principle. The coastal state also asserts criminal and civil jurisdiction over ships inside internal waters.¹⁸⁵⁵ However, the courts of the flag state (i.e., the state whose flag a certain ship flies) have concurrent jurisdiction as long as the act in question took place on board the ship.¹⁸⁵⁶

¹⁸⁵¹ Section 3(1) of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

¹⁸⁵² Shaw op cit 493.

¹⁸⁵³ See *ibid*.

¹⁸⁵⁴ Buergenthal and Murphy op cit 272.

¹⁸⁵⁵ L. Malone, *International Law* (Aspen Publishers 2008) 156.

¹⁸⁵⁶ Shaw op cit 494.

5.2 The territorial sea

Normally, states use the low-water line along the coast as a baseline to measure the territorial sea. This baseline measurement corresponds to concepts of maritime belts and to state practice.¹⁸⁵⁷ It now reflects a traditional principle under customary international law.¹⁸⁵⁸

When the law of the sea first emerged, a debate arose as to whether the high seas (i.e., the oceans apart from narrow coastal zones) should be subject to state sovereignty or open to navigation and use by all states.¹⁸⁵⁹ More precisely, this debate revolved around three points: the breadth of the territorial sea, the nature of the coastal state's rights in the zone, and the right of the vessels of other states to transit the zone.¹⁸⁶⁰

The LOSC provides for the width of the territorial sea as 12 nautical miles (nm) from the low-water line.¹⁸⁶¹ (One nautical mile equals to 1852 metres.)¹⁸⁶² Likewise, the Territorial Sea and Exclusive Economic Zone of Namibia Act defines 'territorial sea of Namibia' as "the sea within a distance of 12 nautical miles measured from the low water line".¹⁸⁶³ Most states accept the 12 nm measure of the territorial sea. Dugard says that, today, the 12 nm limit may be regarded as part of customary international law.¹⁸⁶⁴

Coastal states hold rights and obligations with regard to the territorial seas. For instance, a coastal state may forbid foreign vessels from navigation and trade along the coast (*cabotage*).¹⁸⁶⁵ It may also reserve fisheries rights for its own nationals.¹⁸⁶⁶ A coastal state has a general power of police in matters of security, customs, and fiscal regulation; and the power to lay down regulations with regard to

¹⁸⁵⁷ Brownlie op cit 180.

¹⁸⁵⁸ Shaw op cit 495.

¹⁸⁵⁹ Buergenthal and Murphy op cit 273.

¹⁸⁶⁰ *ibid* 273-277.

¹⁸⁶¹ Article 3 of the United Nations Convention on the Law of the Sea, 1982.

¹⁸⁶² Section 1 of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990, sv 'nautical mile'.

¹⁸⁶³ Section 2(1) of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

¹⁸⁶⁴ J. Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 371.

¹⁸⁶⁵ Brownlie op cit 191.

¹⁸⁶⁶ *ibid*.

health.¹⁸⁶⁷ It may take any measure necessary to enforce compliance with its laws, regulations and prescribed maritime zones.¹⁸⁶⁸ However, unlike its powers with regard to internal waters, a coastal state may not exercise criminal jurisdiction over persons on board a ship in its territorial sea.

Coastal states also shoulder specific obligations. The basic premise is that foreign merchant ships (as distinct from warships) enjoy the right of innocent passage through territorial seas. In Namibia, the Marine Traffic Act, No. 2 of 1981, grants every ship the right of innocent passage through the territorial sea subject to the conditions set forth in the Act.¹⁸⁶⁹ The Act defines a passage as ‘innocent’ if it is “not prejudicial to the peace, good order, or security of Namibia.”¹⁸⁷⁰ In tune with their basic obligation to grant innocent passage to merchant ships, coastal states must warn foreign ships of any dangers within their territorial seas.¹⁸⁷¹ In addition, coastal states may not impede the right of innocent passage.

The Act also lays out circumstances where it forbids innocent passage. More specifically, the Minister responsible for transport may suspend passage of a ship in specified areas of the territorial sea or refuse entry into internal waters if it considers it essential for the protection of Namibia’s security.¹⁸⁷² And the Act does not deem passage ‘innocent’ if a ship carries persons or cargo, any appliance, or any apparatus that may threaten the sovereignty, territorial integrity or political independence of Namibia.¹⁸⁷³

Controversy surrounds what is exactly meant by ‘innocent’.¹⁸⁷⁴ Generally speaking, passage is innocent if it does not compromise peace, good order or security of the coastal state. Thus, the right of innocent passage does not permit foreign ships to navigate towards internal waters. One major aspect of the controversy over the

¹⁸⁶⁷ *ibid.*

¹⁸⁶⁸ *ibid* 201-202.

¹⁸⁶⁹ Section 2 of the Marine Traffic Act, 2 of 1981.

¹⁸⁷⁰ Section 1 of the Marine Traffic Act, 2 of 1981, sv ‘innocent passage’.

¹⁸⁷¹ A. Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2010) 285.

¹⁸⁷² Section 7(1) of the Marine Traffic Act, 2 of 1981.

¹⁸⁷³ Section 8 of the Marine Traffic Act, 2 of 1981.

¹⁸⁷⁴ Shaw *op cit* 507.

meaning of ‘innocent passage’ concerns the question whether the passage of warships in times of peace qualifies as ‘innocent’.¹⁸⁷⁵

5.3 The contiguous zone

It was typically for customs and security purposes that, historically, coastal states claimed a jurisdictional zone outside the territorial sea, the contiguous zone.¹⁸⁷⁶ Accordingly, Article 33 of the LOSC provides that a coastal state may exercise jurisdiction over a contiguous zone in order to:

1. prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; [and]
2. punish infringement of the above laws and regulations committed within its territory or territorial sea.

The LOSC carried over the notion of ‘contiguous zone’ from the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (TSC). The TSC defined ‘contiguous zone’ as “a belt of sea adjacent to its coast” and beyond a state’s land territory and internal waters.¹⁸⁷⁷ By virtue of the TSC, coastal states could claim 12 nm from the baseline used to measure the territorial sea, that is, the low-water line.¹⁸⁷⁸ What the LOSC did is to extend the 12 nm limit to 24 nm from the low-water baseline.¹⁸⁷⁹ Likewise, the Territorial Sea and Exclusive Economic Zone of Namibia Act defines ‘contiguous zone’ as “[t]he sea outside the territorial sea of Namibia but within a distance of 24 nautical miles from the low water line or any other base line from which the territorial was measured.”¹⁸⁸⁰

¹⁸⁷⁵ *ibid* 509.

¹⁸⁷⁶ J. Kraska and R. Pedrozo, *International Maritime Security Law* (Martinus Nijhoff 2013) 10-13.

¹⁸⁷⁷ Article 1(1) of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958.

¹⁸⁷⁸ See Article 3 of the United Nations Convention on Law of the Sea, 1982.

¹⁸⁷⁹ See Article 33(2) of the United Nations Convention on Law of the Sea, 1982.

¹⁸⁸⁰ Section 3A(1) of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

However, the contiguous zone has today lost much of its relevance as it dissolved in the 200 miles of the exclusive economic zones granted to states by the LOSC.¹⁸⁸¹ Few states claim the contiguous zone nowadays.

5.4 Exclusive economic zones

The LOSC grants coastal states the right to claim 200 nm as exclusive economic zone in addition to the 12 nm territorial sea. The Territorial Sea and Exclusive Economic Zone of Namibia Act enshrines that same right. It defines the ‘exclusive economic zone of Namibia’ as “[t]he sea outside the territorial sea of Namibia but within a distance of two hundred nautical miles from the low water line or any other base line from which the territorial sea was measured”.¹⁸⁸²

This zone granted by the LOSC results from the negotiations and deliberations of the United Nations Third Law of the Sea Conference, especially regarding fishing zones, that took place between 1973 and 1982.¹⁸⁸³ During that Conference, some parties argued that states should be able to claim a fishing zone beyond the territorial sea in order to prevent the over-exploitation of marine resources in that zone.¹⁸⁸⁴ This position echoed the argument by other parties, who were asking for the recognition of an exclusive economic zone. The exclusive economic zone thus results from a compromise between states seeking a 200-mile territorial sea and those seeking a more restricted system of coastal state power.¹⁸⁸⁵

Many states have claimed the 200-mile exclusive economic zones in the last two decades.¹⁸⁸⁶ Moreover, the LOSC empowers coastal states to build structures within the exclusive economic zones as one of the ways in which they can exercise their jurisdiction over their

¹⁸⁸¹ M. Gabunelē, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007) 61.

¹⁸⁸² Section 4(1) of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

¹⁸⁸³ Shaw op cit 517-518.

¹⁸⁸⁴ C.G. Lathrop, ‘Baselines’ in D.R. Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 71.

¹⁸⁸⁵ *ibid.*

¹⁸⁸⁶ Shaw op cit 520.

exclusive economic zones.¹⁸⁸⁷ In the exclusive economic zone, coastal states have the right to explore and exploit, conserve and manage natural resources.¹⁸⁸⁸ Also, in that zone all states, whether coastal or land-locked, enjoy freedoms of navigation and overflight, of laying submarine cables and pipelines, and of other internationally lawful uses of the sea.¹⁸⁸⁹ At the same time, states must comply with the laws enacted by coastal states in accordance with the LOSC.¹⁸⁹⁰

In *Martínez*,¹⁸⁹¹ a 26-year-old Spanish national who had been acting as captain of a vessel was charged with using the vessel as a fishing boat or factory within Namibia's exclusive economic zone without authorization. The Sea Fisheries Act¹⁸⁹² (replaced today by the Marine Resources Act, 27 of 2000) made it an offence for a ship registered in a foreign state to use a fishing vessel within Namibia's exclusive economic zone without a licence.¹⁸⁹³ The High Court found him guilty and sentenced him to a fine of N\$300,000 or to four years in prison.¹⁸⁹⁴ Similarly, in *Redondo*,¹⁸⁹⁵ a 34-year-old Spanish national who had been acting as the master of a vessel was charged with fishing in the Namibian exclusive economic zone without a licence. The Supreme Court of Namibia convicted the accused and sentenced him to a fine of N\$250,000 or to three and a half years' jail term.¹⁸⁹⁶

In *Pineiro*, the accused faced charges of fishing within Namibia's EEZ without a permit or a licence.¹⁸⁹⁷ The prosecutor alleged that the accused, in fishing within the EEZ without a permit or a licence,

¹⁸⁸⁷ Article 60 of the United Nations Convention on the Law of the Sea, 1982.

¹⁸⁸⁸ Article 56(1) (a) of the United Nations Convention on the Law of the Sea, 1982.

¹⁸⁸⁹ Article 58(1) of the United Nations Convention on the Law of the Sea, 1982.

¹⁸⁹⁰ Article 58(3) of the United Nations Convention on the Law of the Sea, 1982.

¹⁸⁹¹ *S v Martínez* 1993 NR 1 (HC).

¹⁸⁹² Section 8(1), read with sections 1, 6, 8, 16, 17, 18 and 24(1), of the Sea Fisheries Act, 58 of 1973; and further read with sections 1, 4, 5, 7, and 8 of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990; and with sections 90 and 250 of the Criminal Procedure Act, 51 of 1977.

¹⁸⁹³ This was the alternative charge to the main charge.

¹⁸⁹⁴ *S v Martínez* 1993 NR 1 (HC) 24.

¹⁸⁹⁵ *S v Redondo* 1992 NR 133 (SC).

¹⁸⁹⁶ *ibid* 157.

¹⁸⁹⁷ *S v Pineiro* 1991 NR 424 (HC).

violated section 22A or 8 of the Sea Fisheries Act, read with the relevant provisions of the EEZ Act.

5.5 Straits

A 'strait' denotes a narrow passage in between two bodies of water that could be regarded as part of an exclusive economic zone or the high seas.¹⁸⁹⁸ In the past, the rules applicable to the right of innocent passage would regulate straits found in the territorial sea.¹⁸⁹⁹ With regard to straits that fall in the high seas, the law of the sea views them as falling in the territorial sea by virtue of the LOSC, in terms of which coastal states may claim 12 nm from the low-water baseline as their territorial sea.¹⁹⁰⁰

Article 16(4) of the 1958 Convention on the Territorial Sea lays down that

there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and other part of the high seas or the territorial sea of a foreign state.

The LOSC confers on foreign ships more rights than those included in the right of innocent passage. These greater rights conferred on foreign ships are known as 'transit rights'. Whether the right of transit reflects customary international law remains uncertain.¹⁹⁰¹ State practice goes in different directions.¹⁹⁰² In practice, international agreements and treaties govern passages through straits. Passages through the Suez Canal and the Panama Canal illustrate this practice.

¹⁸⁹⁸ V.L. Forbes, *The Maritime Boundaries of the Indian Ocean Region* (National University of Singapore Press 1995) 144.

¹⁸⁹⁹ R.P. Anand, *Law of the Sea: Caracas and Beyond* (Martinus Brijhoff Publishers 1980) 377.

¹⁹⁰⁰ Forbes op cit 144.

¹⁹⁰¹ Shaw op cit 514.

¹⁹⁰² See ibid.

5.6 The high seas

Unlike internal waters, territorial seas and exclusive economic zones, the high seas fall outside the jurisdiction of any coastal state.¹⁹⁰³ The high seas are vast areas open for navigation by ships from all states, coastal and landlocked alike.

The general principle holds that, on the high seas, no ship from one state may stop another ship from another state.¹⁹⁰⁴ There are exceptions to that principle. On the high seas, a warship from one state may stop and come on board another ship from another state if reasonable suspicions exist that the other ship has failed to fly a national flag or has engaged in piracy, the slave trade, or unauthorized broadcasting.¹⁹⁰⁵ A warship may stop another ship if the UN Security Council authorizes it or if the warship acts in terms of the UN Charter or any other applicable treaty. A coastal state may also conduct hot pursuit in the high seas if a ship has contravened the laws governing its internal waters, territorial sea, contiguous zone, exclusive economic zone, or continental shelf.¹⁹⁰⁶ A coastal state may only carry out a hot pursuit in the high seas if the offence started while the offending ship was still sailing on that state's internal waters, territorial sea, exclusive economic zone, or continental shelf.¹⁹⁰⁷

States may use the high seas for overflight, fishing, scientific research, or the construction of artificial islands, among other activities. The LOSC provides that the high seas may only be used for peaceful purposes. If the *Nuclear Test* cases, decided in the 1974, were referred today to the International Court of Justice or the Tribunal for the Law of the Sea, the outcome would have differed. The testing of nuclear weapons clearly violates the LOSC.¹⁹⁰⁸

The LOSC empowers landlocked states to pass through transit states by all mode of transport in order to exercise their right to the high seas. Nonetheless, the right to the high seas is limited in that landlocked states and transit states must agree on how landlocked

¹⁹⁰³ Lathrop op cit 70.

¹⁹⁰⁴ H. Hestermeyer, *Law of the Sea in Dialogue* (Springer, 2010) 180.

¹⁹⁰⁵ *ibid.*

¹⁹⁰⁶ Malone op cit 167.

¹⁹⁰⁷ Aust op cit 293.

¹⁹⁰⁸ N. Boschiero, *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press 2013) 239.

states can access the sea through transit states.¹⁹⁰⁹ The LOSC does not appear to create an absolute right to pass through transit states to gain access to and from the sea, but rather a right to enter into negotiations and contractual agreements to that effect.

In terms of jurisdiction over persons on board a ship on the high seas, it is the flag state that can exercise jurisdiction.¹⁹¹⁰ Every ship must carry a national flag. A flag state is a state whose flag a ship flies and which therefore has the nationality of that state.¹⁹¹¹ If a ship on the high seas flies the Namibian flag, Namibian courts will have jurisdiction over the people on that ship and Namibian law will apply to that case.

5.7 The continental shelf

The landmass near the coastline constitutes a platform that gradually descends into the ocean. That landmass is called ‘the continental shelf’, an expression borrowed from geology.

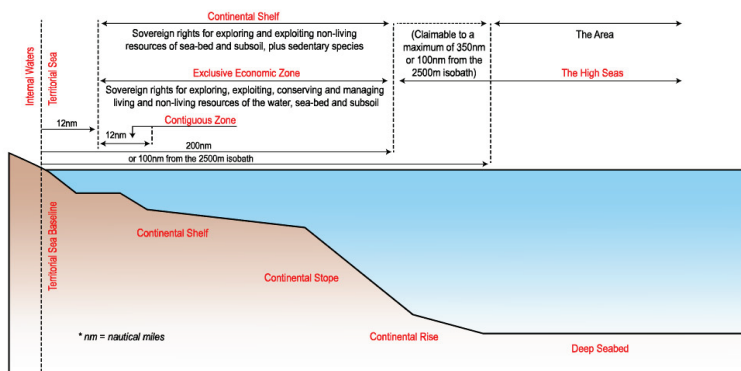


Figure 2: Continental shelf

Source: Fisheries and Oceans Canada (Government of Canada), ‘Sovereignty and UNCLOS: Defining Canada’s Extended Continental Shelf.’¹⁹¹²

¹⁹⁰⁹ J.E.S. Fawcett and A. Parry, *Law and International Resource Conflicts* (Clarendon Press 1981) 114.

¹⁹¹⁰ A.E. Boyle, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2001) 326.

¹⁹¹¹ F. Berlingieri, *Berlingieri on Arrest of Ships*, (5th edn, Informal Law and Finance 2011) 455.

¹⁹¹² <<http://www.dfo-mpo.gc.ca/science/hydrography-hydrographique/UNCLOS/index-eng.html>> accessed 9 July 2017.

The vital interest in the continental shelf lies in the fact that they are rich in oil and gas as well as fishing grounds.¹⁹¹³ This reality led to appropriations of the continental shelf by several states after the World War II.¹⁹¹⁴ Those appropriations resulted from the view that the continental shelf belonged to the high seas and, hence, all states could exploit the shelf.¹⁹¹⁵ Today, the shelf is not viewed and regulated as part of the high seas, but as an exclusive part of the coastal state.

The exploitation of oil and gas increased interest in the continental shelf. Some states contended that, given that the continental shelf stretches from the landmass of the coastal state, the natural resources found in the continental shelf belonged to the coastal state.¹⁹¹⁶ The US also put forward that argument. Many states agreed with that argument such that in 1958 the Geneva Convention on the Continental Shelf (CSC) endorsed that position.

The question of the continental shelf would not pose any problem if all continental shelves reached the ocean depths within 200 nm from the baseline. Indeed, some experts expected that question to fade as most continental shelves would fall in a coastal state's exclusive economic zone. As it turns out, a number of coastal states have continental shelves that stretch beyond the 200-nm limit of their exclusive economic zones.¹⁹¹⁷ The LOSC differs from the CSC in the sense that, although the LOSC recognizes the right of coastal states over their continental shelves, it stipulates that the length of a continental shelf will not be recognized beyond 350 nm from the low-water baseline.¹⁹¹⁸ The Territorial Sea and Exclusive Economic Zone of Namibia Act endorses the LOSC's definition of 'continental shelf'.¹⁹¹⁹

¹⁹¹³ Shaw op cit 521.

¹⁹¹⁴ *ibid* 522.

¹⁹¹⁵ *ibid*.

¹⁹¹⁶ S. Breau, *Q & A Revision Guide International Law 2013 and 2014* (Oxford University Press 2013) 104.

¹⁹¹⁷ United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3; (1982) 21 I.L.M. 1261.

¹⁹¹⁸ Article 76 of the United Nations Convention on the Law of the Sea, 1982.

¹⁹¹⁹ Section 6(1) of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 3 of 1990.

5.8 The deep-sea bed

As is the case with the continental shelf, interest in the deep-sea bed developed owing to the minerals and hydrocarbons available for exploitation in that zone. As a general principle, natural resources found in the deep-sea bed may only be exploited for the benefit of the entire humankind, including landlocked states.¹⁹²⁰ If a part of the deep-sea falls under the 200-nm limit of the exclusive economic zone of a coastal state, that part of the deep-sea bed belongs to that coastal state and that state can thus exploit it.¹⁹²¹ But the international rules that regulate the deep-sea relate to the deep-sea area outside the exclusive economic zones of coastal states.¹⁹²²

Headquartered in Jamaica,¹⁹²³ the International Sea-Bed Authority manages the deep-sea.¹⁹²⁴ Initially, developed states found fault with the way the Authority managed the deep-sea. The 1994 New York Agreement precisely aimed to address the concerns of developed states. It spoke to those concerns in at least four ways:¹⁹²⁵ The Agreement accords the US and other major economic powers sufficient influence over decisions on the deep-sea bed,¹⁹²⁶ it guarantees the US a seat on the critical executive council, it also ensures access to deep-sea bed minerals, and it eliminates compulsory technology transfer¹⁹²⁷ and production controls.¹⁹²⁸

However, not much headway has been achieved when it comes to the exploitation of the deep-sea bed as the market value of resources extracted from the bed has dropped.

¹⁹²⁰ Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 'Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area' (2011) <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_o> accessed 27 July 2017.

¹⁹²¹ R.D. Peddle, *The Mariner's Handbook* (Hydrographer of the Navy 1999) 39.

¹⁹²² House of Commons, 'UK Deepwater Drilling – Implications of the Gulf of Mexico Oil Spill' (Second report of session 2010-11) 98.

¹⁹²³ Article 156(4) of the United Nations Convention on the Law of the Sea, 1982.

¹⁹²⁴ Article 157(1) of the United Nations Convention on the Law of the Sea, 1982.

¹⁹²⁵ See also Message from the US President to the US Senate, p.VII-VIII op cit.

¹⁹²⁶ Annex: Section 3 of the New York Agreement, 1994.

¹⁹²⁷ Annex: Section 5 of the New York Agreement, 1994.

¹⁹²⁸ Annex: Section 6 of the New York Agreement, 1994.

6. The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea (ITLOS) seeks to resolve disputes about how to interpret and apply the LOSC.¹⁹²⁹ The LOSC also set up a special tribunal within the ITLOS and tasked with the settlement of disputes relating to the deep-sea bed, namely the Seabed Disputes Chamber.¹⁹³⁰

Established in 1996, the ITLOS is based in Hamburg, Germany. States are required to solve disputes regarding the law of the sea by diplomatic means.¹⁹³¹ If diplomacy fails, states must then refer the dispute to courts for settlement.

States are given a choice between the ITLOS, the International Court of Justice, or any arbitral tribunals provided for in the annexes to the LOSC.¹⁹³² States express their choice when they sign or ratify the LOSC.

The ITLOS has handed down judgements in several cases. In certain cases, states have preferred to resolve issues by arbitral tribunals or by means other than those provided by the ITLOS. Nevertheless, the ITLOS remains a useful institution and may even become instrumental in settling the issue of maritime boundaries between Namibia and South Africa over the Orange River.¹⁹³³ The parties have been negotiating and contesting each other's sovereignty over the river since Namibia's Independence in 1990. On the one hand, Article 1(4) of the Namibian Constitution draws Namibia's southern boundary in "the middle of the Orange River". On the other hand, South Africa claims the northern high-water mark as the boundary fixed between Britain and Germany in an 1890 treaty. Although they have established a working group in 2014 to delve into the matter, the two riparian nations may end up calling upon the ITLOS to mediate that issue.

¹⁹²⁹ N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2004) 3.

¹⁹³⁰ Articles 186 and 187 of the Convention on the Law of the Sea, 1982.

¹⁹³¹ Klein op cit 4.

¹⁹³² S. Wu and K. Zou, *Arbitration Concerning the South China Sea: Philippines Versus China* (Routledge 2016) 60.

¹⁹³³ See also A. Sheehan, 'Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes' (2005) 24 University of Queensland Law Journal 165.

Another dispute erupted, this time between Ghana and Côte d'Ivoire, regarding maritime delimitation in an oil-rich area. The two parties submitted a special agreement to a special chamber of the ITLOS.¹⁹³⁴ The parties had concluded on 3 December 2014. The special tribunal handed down its judgment on 23 September 2017.

Ghana chiefly argued that a tacit agreement between the parties arising from past activities by both parties in extracting oil in the area in dispute. The tribunal made a number of rulings. First, it ruled that no tacit agreement between the parties delimited their respective territorial sea, exclusive economic zones and continental shelf. Crucially, however, the tribunal found that Ghana did not violate Côte d'Ivoire's territorial sovereignty. That is, the tribunal found in Ghana's favour.

The law of the sea does not only represent one the first areas that international law regulated, it also afforded Namibian courts their earlier opportunities to apply international law domestically. And, together with the use of force (including force authorized by the UN or the AU), human rights, and economic relations (including regional trade in the form of SACU), the law of the sea drives home a basic theme when you explore international law in the Namibian context. It buoys up the insight that international law has – in no small measure – ‘fathered’ Namibia itself.

¹⁹³⁴ *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* List of cases: No. 23 Judgment of 23 September 2017
<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C_23_Judgment_23.09.2017_corr.pdf> accessed 9 November 2018.

NAMIBIA, CHILD OF INTERNATIONAL LAW

In writing this book, I first aimed to offer deep insights about international law in the history and life of Namibia. Vice versa, I also wanted to look into the role that Namibia, as small as it is demographically, played in developing international law. I am not disappointed. As you now know from reading the various chapters, Namibia helped develop international law in no negligible manner. And, with the reparation claims against Germany for the genocide of Ovahereros and Namas during the War of National Resistance (1904-1908), Namibia is yet again poised to make history. In this major undertaking, Namibia will need to use the tools of international law strategically.

In closing this textbook, I would like to do two things. First, I restate my overall thinking and reveal the various threads of that thinking, as woven through the previous 18 chapters. Then, I present a framework for approaching international law questions in general and from the vantage point of Namibia and Namibian law.

1. The umbilical cord binding Namibia to international law

Based on the content of this book, you could say, metaphorically, that international law is as an integral part of Namibia like the sun on the country's flag. The influence of international law does not always leave visible traces in national law as certain legislation emanates from national legislatures yet their content originate in international law, for instance, the Namibian Constitution undoubtedly is 'domestic' but the tenor of its Bill of Rights directly draws from the Universal Declaration of Human Rights, an international legal instrument. Take also the case of the Import and Export Control Act,¹⁹³⁵ which control imports and exports in Namibia. Although the Act does not expressly refer to international law, the rules on import and export control are also governed by international trade law and treaties, such as the

¹⁹³⁵ Import and Export Control Act, 30 of 1994.

Southern African Customs Union (SACU) Agreement of 2002. The same holds true for the Marine Traffic Act,¹⁹³⁶ which regulates maritime transport in the country: The Act does not expressly mention the rules of international law, but the international law of the sea frames and informs that Act.

The mechanism by which Namibia integrates international law into its domestic legal system is Article 144. And, insofar as it restates the general principles of public international law, this book embodies the beautiful gifts of international law to Namibia.

In sum, international law *defines* Namibia to a large extent. This definition manifests in certain key elements:

1. International law framed the constitutional and democratic order of Namibia through Resolution 435 and the Constitutional Principles of 1982 annexed to it.

2. The fact that the League of Nations classified Namibia as a C Mandate expressly authorised South Africa to extend its legal system to South West Africa/Namibia, which it did through Proclamation 20 of 1919. Namibia perpetuated that South African legal heritage and gift from international law through Articles 66 and 140, which make all the South African laws that existed at the time of Independence in 1990 still applicable in Namibia insofar as they do not conflict with the Constitution or any Namibian legislation.

3. International law structured Namibia's economy and prosperity around regional trade through the Southern African Customs Union (SACU), which is Namibia's biggest source of revenue.

4. Article 144 of the Constitution made Namibia largely a monist country, which puts it in close contact and constant relationship with international law.

5. International law guarantees Namibia's territorial integrity by recognising and protecting Namibia's borders, though it does not only protect Namibia's borders but also safeguards the territorial sovereignty of virtually all states in the world.

¹⁹³⁶ Maritime Traffic Act, 2 of 1981.

While scholars have long wondered and pondered why states obey international law, the experience in Namibia shows that states may have to obey international law because it can lead them to democracy, development, prosperity, peace and stability. *The question is not whether you obey international law because you promised to do it; rather, the question is whether the way you apply it will take you where you wish to go.*

In making international law part of its development and independence strategies, Namibia had to brave the Eurocentrism and racism that permeated processes in the international community of nations. This was especially the case in the 1940s when representatives of South West Africa petitioned the UN.¹⁹³⁷ They fought an uphill battle as the Security Council and the General Assembly comprised of South Africa's allies and trading partners such as the United States (US) and the United Kingdom.¹⁹³⁸

The ideological, political, economic, and cultural forces of a civilising group of nations located in Western Europe disadvantaged Namibia and kept it away from independence and liberation for decades. Along the way, countless brave Namibian warriors lost their lives. In spite of these enormous obstacles, Namibia forged ahead and achieved independence in 1990. Namibia thus provides a living example of how normative systems, knowledge and technology originating in foreign nations can nevertheless serve the strategic interests of a country, even when those foreign nations nurture deep-seated racist and otherwise hostile motives. The sweet irony of a country re-programming, for its own emancipation and development, a system initially designed to put it in shackles!

The takeaway point is that sometimes the virtue of something lies not in its inner substance or its originator, but in the way you use it. It is not ***substance as such, but strategy***. A medicine does not work miracles simply because of its substance, its inherent medical virtues or the promises it holds out, it brings about the desired effect because of the way you use it.

¹⁹³⁷ See D.U. Zaire, 'Namibia and the United Nations Until 1990' in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia's Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 39-42.

¹⁹³⁸ See *ibid.*

The rules of international law do have a lot of merit, but their virtues do not ensue automatically when states apply international law; states must incorporate it in their national legal systems intelligently and consciously.

Appreciating what Namibia contributed to international law starts by recognizing the *choices* the country faced and those that it eventually made. For example, Namibia could have decided to get rid of its South African legal heritage upon Independence. In fact, as Horn observed, it was widely expected that, upon Independence, Namibia would throw out that heritage, long tainted by apartheid ideology.¹⁹³⁹ Instead, it decided to include in the Constitution a provision that ensured the continued application of that heritage. Similarly, Namibia could have opted out of the new SACU Agreement in 2002. Instead, it decided to stay with the world's oldest functioning customs union. That Namibia made these choices does not take away from the fact that it could have decided otherwise. The course of history would have certainly changed. But the bottom line is that Namibia made the decisions it did; and, in those decisions, lies the wisdom and judiciousness of their choices and contributions to the development of international law.

Here, I do not emphasize that the leaders of the Namibian people faced choices (because the choices did not crystallize as part of Namibian history) and that the better ones were not obvious. Surely, mistakes were made more than once. For instance, scholars from the Third World Approaches to International Law (TWAIL) movement¹⁹⁴⁰ would probably contend that Namibian leaders should not have turned theirs into a monist country. No, the point here is rather to show how the choices they made proved more or less pragmatic and enlightened.

¹⁹³⁹ See N. Horn, *Interpreting the Interpreters (The Namibian Constitution in the Courts)* (Konrad Adenauer Stiftung, 2017) 6.

¹⁹⁴⁰ See J.T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade Law and Development 26.

2. Major contributions

Throughout the book, I showed how international law defined Namibia and how Namibia, in turn, helped shape the development of international law. Here, I highlight major instances of these institutionally formative exchanges, as described, explained and discussed in the various chapters of this book. First, Namibia's long march towards independence informed the theory on legitimate institutions of governance; South West Africa/Namibia effectively served as a 'laboratory of statehood.' It also clarified the status of mandates created by the League of Nations and, by extension, mandates in general under international law. Second, Namibia is an exemplar of an effective integration of international law in municipal law by making international law one of the substantive and formal sources of law. This exemplar carries implications for the theories on the relationship between international law and municipal law (i.e., monism, dualism, and coordination).

Moreover, Namibia tells a story about how a subjugated nation, like the people of Western Sahara, can petition the UN and manage, over time, to persuade it to decide in its favour. Indeed, the leaders of Namibia, such as Hosea Kutako and Andimba Toivo ya Toivo, petitioned both the League of Nations¹⁹⁴¹ and the United Nations (UN);¹⁹⁴² over time that strategy paid off.

Fourth, in the fields of sources, interpretation of treaties and state responsibility, the dispute between Namibia and South Africa gave rise to the notion of obligations *erga omnes* and to the development of *actio popularis*. Notably, the *Namibia Case* specified the three negative obligations on states flowing from a state's violation of international law.¹⁹⁴³

Other traces of Namibia's imprint appear in rules regulating territory in international law. Walvis Bay and the Penguin Islands illustrate cession. The 'general principles common to civilised

¹⁹⁴¹ C. Saunders, 'Namibian Diplomacy Before Independence' in A. Bösl, A. du Pisani, and D.U. Zaire (eds), *Namibia's Foreign Policy: Historic Contexts, Current Dimensions, and Perspectives for the 21st Century* (Konrad-Adenauer-Stiftung 2014) 27.

¹⁹⁴² *ibid.* See also Zaire *op cit* 39ff.

¹⁹⁴³ *Namibia Case* [Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)], *Advisory Opinion*, [1971] I.C.J. Reports 16.

nations', as a source of law, was enriched by the use of prescription in the *Kasikili-Sedudu* case. At the same time, the cession of Walvis Bay offers an example of estoppel and self-determination with respect to colonial enclaves.

Sixth, with reference to state responsibility and dispute resolution, the reparation claims brought by representatives of the Nama and Herero communities and envisaged by the Namibian government hold great promise. In particular, these claims have the potential to set a precedent in the field of state responsibility in the same way the *South West Africa Cases* have become landmark decisions in public international law. Those cases had a ripple effect in another area of international law: the law of the sea. Indeed, the decision in the *South West Africa Cases* discouraged developing nations and led them to lose faith in the International Court of Justice. In response to that controversial decision, developing nations instigated the creation of the United Nations Tribunal for the Law of the Sea. That Tribunal thus finds a historical and justificatory connection to Namibia.

Some choices, such as staying with SACU and the Multilateral Monetary Area (MMA), are controversial and difficult to assess. Nonetheless, Namibia's choice to stay with SACU proves that a customs union can strengthen the stability and prosperity of national economies. This holds true even if, in the case of SACU, the union in question was a colonial structure. The observation that SACU receipts are the greatest source of revenue for Namibia provides a crude measure of the wisdom and strategic value of this choice. Last but not least, the United Nations Transition Assistance Group (UNTAG) oversaw and steered Namibia's transition to political independence. UNTAG demonstrated that supervision by the international community can successfully pave the way and lead to desirable outcomes. Namibia is the UN's ultimate success story.¹⁹⁴⁴

¹⁹⁴⁴ H. Melber, *Understanding Namibia: The Trials of Independence* (Jacana Media 2014) 162.

3. The challenges

The cohabitation of international law and national law raises certain challenges. I must say that some of these challenges present the flip side of the advantages of international law. Thus, while SACU offers tremendous economic benefits to Namibia, the fact that the Namibian economy has remained over-dependent on exports and unequal in terms of income distribution may impede the country's efforts to build a more inclusive society. Plus, SACU carries with it risks that it may entrench unequal inter-state exchanges and undermine industrialization in Botswana, Lesotho, Namibia, and Swaziland (now eSwatini).

Third, Namibian courts and lawyers do not use international law as often as they invoke other sources of Namibian law. Namibian courts have a mixed record in applying international law norms in domestic cases. While the higher courts have produced historic judgments after they applied the rules of international law domestically; in a number of cases, such as *Likany*,¹⁹⁴⁵ they have poorly misapplied international law. Last but not least, the public declarations of the Namibian government that it wishes to withdraw from the Rome Statute establishing the International Criminal Court show that the government underestimates the magnitude of the reputational harm it may suffer from disavowing publicly and ostensibly the values of international criminal justice behind the Rome Statute.

4. Analytical and evaluative framework

In this section, I would like to formalise and systematise a framework for analysing and assessing questions of law with an international dimension or involving a dispute between states. This framework views these questions from the perspective of municipal law, here Namibian law.

The framework has four essential components, namely the sources of international law, the place of international law in municipal law, state responsibility, and dispute resolution. To

¹⁹⁴⁵ *S v Likany* (3) NR 771 (SC).

understand this framework, assume that one of Namibia's neighbours – let us call it State X – encroaches on Namibia's territorial sea by claiming that its borders extend beyond the internationally recognised boundaries of Namibia.

In analysing this issue and assessing State X's claims, you have to ascertain where international law stands on that issue. This inquiry requires that you delve into the *sources* of international law. As I explained in Chapter 10, the territory of Namibia is defined by international treaties and a resolution by the United Nations General Assembly.

After ascertaining the source of the applicable legal rules (the legal position) and their relative binding force in the hierarchy of international law norms, the next step is to locate the *place of that international law within municipal law*. In Namibia, Article 144 of the Constitution forms the basis for applying international law in domestic cases. You must thus familiarize yourself with the provisions of Article 144 when you analyse questions of international law from a Namibian perspective.

Then, you must determine whether State X bears any responsibility for allegedly violating Namibia's territorial integrity. That is when the *rules on state responsibility* come onstage. They tell you when and how to define, invoke, attribute and excuse state responsibility, among other things.

Finally, after you identified the source of the international law obligations applicable to the case, located the obligations within the domestic or Namibian legal system, and determined State X's responsibility for the violation of the applicable obligations, you must proceed to decide in which forum to resolve the dispute. Generally speaking, you can resort to diplomatic or political means to resolve disputes, or you may choose adjudication. Odds are that you will prefer diplomatic means, but the real lesson is that you must always include dispute-settlement methods and fora in your thinking process.

Now that Namibia has secured its political independence, the next big-picture challenge consists in winning its economic

development in a globalised world. This challenge, more than any other before, calls for even more enlightenment. The economic recession Namibia has slid into since 2016 underlines this point. Globalisation represents a much more daunting challenge than the sheer racism and Eurocentrism of the colonial enterprise, though globalisation was the force that drove this imperialist enterprise. Nevertheless, other states can learn from the Namibian experience that it is not the size of the population, the territory or the economy of a country that makes the difference, it is the depth of its leaders' wisdom. Only this sort of enlightenment will allow Namibia to reap the benefits of globalisation while avoiding its pitfalls.

Namibia has been fortunate to have leaders with internationalist views who managed to deploy the language and tools of international law for its own developmental and emancipatory purposes. This is demonstrated by a key political and historical figure in Namibia's history, President Hage Geingob. In July 2017, at the official launch of the lecture series on foreign policy named after the country's longest-serving top diplomat Theo-Ben Gurirab, President Geingob reminded the audience that SWAPO's diplomacy comprised three phases.¹⁹⁴⁶ The first phase ensured that the UN and the international community as a whole continued to support their fight for Namibia's right to self-determination and independence. The second phase ensured that Namibia's position was not compromised during the negotiations involving Resolution 435 on the transition to Namibia's independence. The third and current phase shapes and positions Namibia's foreign policy strategically.

Once again, Namibia's leadership displayed its internationalism when former US President George W. Bush visited Namibia in April 2017. President Geingob told his distinguished guest at a gala dinner organised for him at State House that Namibia is a "child of international solidarity", "midwifed" by the UN and a friend to all... "unless they declare themselves our enemy."¹⁹⁴⁷

¹⁹⁴⁶ Address by His Excellency President Hage Geingob on the occasion of the official launch of the Theo Ben-Gurirab Lecture Series, Windhoek, Namibia, 31 July 2017.

¹⁹⁴⁷ K. Tjitemisa, 'Geingob Asks Bush to Promote Namibia', *New Era* (Windhoek, 7 April 2017) <<https://www.newera.com.na/2017/04/07/geingob-asks-bush-to-promote-namibia/>> accessed 4 September 2017.

THE MANDATE FOR SOUTH WEST AFRICA

The Council of the League of Nations:

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on 28 June, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part 1 (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and Whereas His Britannic majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nation in accordance with the following provisions; and

Whereas by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of nations:

Confirming the said Mandate, defines its terms as follows:

Article 1

The Territory over which a mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (herein called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South West Africa.

Article 2

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory subject to such local modifications and circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory subject to the present Mandate.

Article 3

The Mandatory shall see that the slave trade is prohibited and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control for the arms traffic signed on 10 September, 1919, or in any Convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

Article 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval base shall be established or fortifications erected in the territory.

Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

Article 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiations shall be submitted to the Permanent Court of International Justice provided for by article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva on the 17th day of December, 1920.

RESOLUTION 435 (1978) ON NAMIBIA'S INDEPENDENCE

Resolution 435 (1978)

of 29 September 1978

The Security Council,

Recalling its resolutions 385 (1976) of 30 January 1976 and 431 (1978) and 432 (1978) of 27 July 1978,

Having considered the report of the Secretary-General submitted pursuant to paragraph 2 of resolution 431 (1978)⁶¹ and his explanatory statement made in the Security Council on 29 September 1978 (S/12869),⁶²

Taking note of the relevant communications from the Government of South Africa to the Secretary-General,

Taking note also of the letter dated 8 September 1978 from the President of the South West Africa People's Organization to the Secretary-General,⁶³

Reaffirming the legal responsibility of the United Nations over Namibia,

1. *Approves* the report of the Secretary-General on the implementation of the proposal for a settlement of the Namibian situation⁶⁴ and his explanatory statement;

2. *Reiterates* that its objective is the withdrawal of South Africa's illegal administration from Namibia and the transfer of power to the people of Namibia with the assistance of the United Nations in accordance with Security Council resolution 385 (1976);

3. *Decides* to establish under its authority a United Nations Transition Assistance Group in accordance with the above-mentioned report of the Secretary-General for a period of up to 12 months in order to assist his Special Representative to carry out the mandate conferred upon him by the Security Council in paragraph 1 of its resolution 431 (1978), namely, to ensure the early independence of Namibia through free elections under the supervision and control of the United Nations;

⁵⁹ *Ibid.*, document S/12866.

⁶⁰ *Ibid.*, document S/12872.

⁶¹ *Ibid.*, document S/12827.

⁶² *Ibid.*, *Thirty-third Year, 2087th meeting, paras. 11-22.*

⁶³ *Ibid.*, *Supplement for July, August and September 1978, document S/12841.*

⁶⁴ *Ibid.*, *Supplement for April, May and June 1978, document S/12636.*

4. *Welcomes* the preparedness of the South West Africa People's Organization to co-operate in the implementation of the Secretary-General's report, including its expressed readiness to sign and observe the cease-fire provisions as manifested in the letter from its President of 8 September 1978;

5. *Calls upon* South Africa forthwith to co-operate with the Secretary-General in the implementation of the present resolution;

6. *Declares* that all unilateral measures taken by the illegal administration in Namibia in relation to the electoral process, including unilateral registration of voters, or transfer of power, in contravention of resolutions 385 (1976), 431 (1978) and the present resolution, are null and void;

7. *Requests* the Secretary-General to report to the Security Council not later than 23 October 1978 on the implementation of the present resolution.

Adopted at the 2087th meeting by 12 votes to none, with 2 abstentions (Czechoslovakia, Union of Soviet Socialist Republics).⁶⁵

Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia

UNITED
NATIONS

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Security Council

Distr.
GENERAL

S/15287
12 July 1982

ORIGINAL: ENGLISH

LETTER DATED 12 JULY 1982 FROM THE REPRESENTATIVES
OF CANADA, FRANCE, GERMANY, FEDERAL REPUBLIC OF,
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND AND THE UNITED STATES OF AMERICA ADDRESSED
TO THE SECRETARY-GENERAL

On instructions from our Governments we have the honour to transmit to you the text of Principles concerning the Constituent Assembly and the Constitution for an independent Namibia put forward by our Governments to the parties concerned in the negotiations for the implementation of the proposal for a settlement of the Namibian situation (S/12636) in accordance with Security Council resolution 435 (1978) adopted on 29 September 1978.

We have pleasure in informing you that all parties to the negotiation now accept these Principles. Our Governments believe that a decision on the method to be employed to elect the Constituent Assembly should be made in accordance with the provision of Security Council resolution 435 (1978). All parties are agreed that this issue must be settled in accordance with the terms of Security Council resolution 435 (1978) and that the issue must not cause delay in the implementation of 435 (1978). In this regard, our Governments are in consultation with all parties.

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English
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We have the honour to request that this letter and the Principles be circulated as a document of the Security Council.

(Signed) Gérard PELLETIER
Permanent Representative of Canada
to the United Nations

(Signed) Luc de La BARRE de NANTEUIL
Permanent Representative of France
to the United Nations

(Signed) Ernst-Joerg von STUDNITZ
Chargé d'Affaires, a.i.
of the Federal Republic of Germany
to the United Nations

(Signed) Hamilton Whyte
Deputy Permanent Representative of the
United Kingdom of Great Britain and
Northern Ireland to the United Nations
Chargé d'Affaires, a.i.

(Signed) William C. Sherman
Acting Permanent Representative
of the United States of America
to the United Nations

/...

Annex

Principles concerning the Constituent Assembly and
the Constitution for an independent Namibia

A. Constituent Assembly

1. In accordance with United Nations Security Council Resolution 435 (1978), elections will be held to select a Constituent Assembly which will adopt a Constitution for an independent Namibia. The Constitution will determine the organization and powers of all levels of government.

- Every adult Namibian will be eligible, without discrimination or fear of intimidation from any source, to vote, campaign and stand for election to the Constituent Assembly.
- Voting will be by secret ballot, with provisions made for those who cannot read or write.
- The date for the beginning of the electoral campaign, the date of elections, the electoral system, the preparation of voters rolls and other aspects of electoral procedures will be promptly decided upon so as to give all political parties and interested persons, without regard to their political views, a full and fair opportunity to organize and participate in the electoral process.
- Full freedom of speech, assembly, movement and press shall be guaranteed.
- The electoral system will seek to ensure fair representation in the Constituent Assembly to different political parties which gain substantial support in the election.

2. The Constituent Assembly will formulate the Constitution for an independent Namibia in accordance with the principles in Part B below and will adopt the Constitution as a whole by a two-thirds majority of its total membership.

B. Principles for a Constitution for an Independent Namibia

1. Namibia will be a unitary, sovereign and democratic state.
2. The Constitution will be the supreme law of the state. It may be amended only by a designated process involving the legislature and/or votes cast in a popular referendum.

/...

3. The Constitution will determine the organization and powers of all levels of government. It will provide for a system of government with three branches: an elected executive branch which will be responsible to the legislative branch; a legislative branch to be elected by universal and equal suffrage which will be responsible for the passage of all laws; and an independent judicial branch which will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law. The executive and legislative branches will be constituted by periodic and genuine elections which will be held by secret vote.

4. The electoral system will be consistent with the principles in A. 1. above.

5. There will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection from arbitrary deprivation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.

6. It will be forbidden to create criminal offences with retrospective effect or to provide for increased penalties with retrospective effect.

7. Provision will be made for the balanced structuring of the public service, the police service and the defense services and for equal access by all to recruitment of these services. The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies.

8. Provision will be made for the establishment of elected councils for local and/or regional administration.

This book provides readers with the knowledge necessary to fully understand how international law carved the history and life of Namibia. It observes that Namibia has benefited from and contributed to international law in a way that shaped that country's political and socio-economic development and to an extent that few other countries experienced.

For many a year since Namibia achieved Independence on 21 March 1990 and established the Faculty of Law at the University of Namibia in 1992, students and lecturers have relied on materials from South Africa, despite the fact that Namibian law has since then grown apart from its South African heritage. It is high time for lecturers and students in Namibia to teach and learn with a textbook that analyses international law from the distinct standpoint of Namibia and that views the nation's legal interactions with other states through its own prism! And this textbook aims to do just that.

Through its 19 chapters, this book informs readers about international law, its sources, international treaties, Namibian statehood, dispute resolution, the use of force, human rights, Namibia's economic relations with the outside world (including the Southern African Customs Union), and the law of the sea.

Namibian courts have in their own way followed the rules of international law scrupulously, but – as this book shows – international law nonetheless remains the source of Namibian law that lawyers apply the least. Accordingly, this book underlines the significance, the practical utility, and the relevance of international law in the unique Namibian context.

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Langaa Research & Publishing
Common Initiative Group
P.O. Box 902 Mankon
Bamenda
North West Region
Cameroon

ISBN 978-9956-550-44-9



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